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**Human rights**

**Future work of the Permanent Forum, including issues of the Economic and Social Council and emerging issues**

## Preliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery

**Submitted by the Special Rapporteur**

*Summary*

At its eighth session in May 2009, the Permanent Forum on Indigenous Issues decided to appoint as Special Rapporteur Tonya Gonnella Frichner, a member of the Permanent Forum, to conduct a preliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery, which has served as the foundation of the violation of their human rights, and to report thereon to the Forum at its ninth session.

This preliminary study establishes that the Doctrine of Discovery has been institutionalized in law and policy, on national and international levels, and lies at the root of the violations of indigenous peoples' human rights, both individual and collective. This has resulted in State claims to and the mass appropriation of the lands, territories and resources of indigenous peoples. Both the Doctrine of Discovery and a holistic structure that we term the Framework of Dominance have resulted in centuries of virtually unlimited resource extraction from the traditional territories of indigenous peoples. This, in turn, has resulted in the dispossession and impoverishment of indigenous peoples, and the host of problems that they face today on a daily basis.

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Given that United States of America federal Indian law is most accessible to the Special Rapporteur, and because it serves as an ideal example of the application of the Doctrine of Discovery to indigenous peoples, this preliminary study provides a detailed examination of the premise of that system as found in the United States Supreme Court ruling *Johnson's Lessee v. McIntosh*. Evidence is then provided demonstrating that the Doctrine of Discovery continues to be treated as valid by the United States Government.

The Special Rapporteur concludes by recommending that an international expert group meeting be convened to discuss in detail the findings and implications of this preliminary study of the Doctrine of Discovery, and present its findings to the Permanent Forum at its annual session. Further study and review will be needed to ascertain to what extent and how the Doctrine of Discovery and the Framework of Dominance are applied to indigenous peoples throughout the world.

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> We maintain, that the principle declared in the fifteenth century as the law of Christendom, that discovery gave title to assume sovereignty over, and to govern the unconverted natives of Africa, Asia, and North and South America, has been recognized as a part of the national law [Law of Nations], for nearly four centuries, and that it is now so recognized by every Christian power, in its political department and its judicial.[1]

# I. Introduction

1. The Permanent Forum on Indigenous Issues has a mandate to discuss issues related to indigenous economic and social development, culture, the environment, education, health and human rights. This preliminary study will examine the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery, which has served as the foundation of the violation of their human rights.

2. Part of the objective of this preliminary study is to draw attention to differences in world view between indigenous peoples and State actors, with the understanding that focusing on those differences will be conducive to further dialogue and clearer communication between them.

3. The United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 61/295, annex) is the product of efforts spanning three decades. The Declaration addresses human rights grievances and other concerns that indigenous peoples' representatives have brought to the international arena since the early 1900s, during the days of the League of Nations. The adoption of the Declaration presents the opportunity to clearly identify what lies at the root of those grievances and concerns, namely, the historic tendency of State actors to assert a sovereign dominant authority over indigenous peoples, based on claims to and assertions of ultimate or superior title to indigenous peoples' lands, territories and resources. This paper demonstrates that the Doctrine of Discovery lies at the root of such claims and assertions of dominance by States.

[1] Judge John Catron for the Supreme Court of Tennessee in the case *State v. Foreman* 16 Tenn. (8 Yerg.) 256, 277 (1835). For a further discussion of how Judge Catron's ruling pertains to this preliminary study, see paras. 5-17 below.

## II. Future work on the global scope of the Doctrine of Discovery

4. The extent to which the Doctrine of Discovery and the Framework of Dominance[2] have been applied in case law and policy in Africa, Asia, Central and South America will need to be thoroughly investigated and addressed as a follow-up to this preliminary study. As countries that emerged from the imperial and colonial history of the British crown, Australia, Canada and New Zealand will also need to be made part of any future study. We fully recognize and appreciate that our indigenous brothers and sisters are dealing with the impacts of the Doctrine of Discovery and the Framework of Dominance in their geographical regions. However, given the limited constraints of a preliminary study, our focus has been primarily on United States federal Indian law. This preliminary study is intended to serve as a model that sets forth a direction for future research in other regions of the world. Future study will be required to address the seven official regions identified by the Permanent Forum. United States federal Indian law, which has been referenced in case law in other countries of the world,[3] is treated in this preliminary study as a prototypical example of the application of the Doctrine of Discovery and the dominance framework.

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[2] The Old World idea of property was well expressed by the Latin *dominium*: from *dominus* which derived from the Sanskrit *domanus* (he who subdues). *Dominus* in the Latin carries the same principal meaning (one who has subdued), extending naturally to signify "master, possessor, lord, proprietor, owner". *Dominium* takes from *dominus* the sense of "absolute ownership" with a special legal meaning of property right of ownership (see Lewis and Short, *A Latin Dictionary* (1969 ed.)). *Dominatio* extends the word into "rule, dominium, and ... with an odious secondary meaning, unrestricted power, absolute dominium, lordship, tyranny, despotism. Political power grown from property — dominium — was, in effect, domination" (William Brandon, *New Worlds for Old* (1986)). In this preliminary study, "Framework of Dominance" and "dominance framework" are both used in this latter sense. State claims and assertions of "dominion" and "sovereignty over" indigenous peoples and their lands, territories and resources trace to these dire meanings, handed down from the days of the Roman Empire, and to a history of the dehumanization of indigenous peoples. This is at the root of indigenous peoples' human rights issues today.

[3] In *Conquest by Law*, Professor Lindsay Robertson states that the reach of the *Johnson v. McIntosh* decision "has been global". He continues: "In its 1984 decision in *Guerin v. The Queen*, for example, the Supreme Court of Canada, after citing *Johnson*, held that 'Indians have a legal right to occupy and possess certain lands, the ultimate fee to which is in the Crown'. Under Canadian law, as under U.S. law, the tribes lost ownership of their lands by virtue of discovery". Robertson then mentions that the High Court of Australia cited *Johnson* in a remarkable opinion — *Mabo v. Queensland* — which, while recognizing for the first time land claims of indigenous Australians, nevertheless limited those claims under a variation of the doctrine of discovery. There too, the discovering European sovereign was recognized to be the owner of the underlying title to indigenous lands. Professor Robertson does not, however, appear to question or challenge the claim that "discovery" resulted in indigenous nations and peoples "losing" "ownership of their lands". In the Canadian context, Thomas Issac's book *Aboriginal Law* lists *Johnson v. McIntosh* under the heading "Aboriginal Title" in the table of contents. In fact, the *Johnson* ruling is the second document in his book, after the 1763 British Royal Proclamation.

## III. Global scope and history of the Doctrine of Discovery

5. What is now called "international law" was previously known as the Law of Nations.[4] In the late nineteenth century, for example, the international law scholar Thomas Erskine Holland referred to the law of nations as "the law of Christendom; as little applicable to infidels as was the 'common law' of the Greek cities ... to societies of barbarians".[5] In 1835, Judge John Catron (1786-1865), while seated on the Supreme Court of the State of Tennessee (United States),[6] officially identified "a principle" as part of "the law of Christendom", specifically, "that discovery gave title to assume sovereignty over, and to govern the unconverted [non-Christian] peoples of Africa, Asia, and North and South America". Catron declared that this principle had been recognized as a part of the Law of Nations "for nearly four centuries, and that it is now so recognized by every Christian power, in its political department and its judicial".[7]

6. This preliminary study establishes that the terminology of early international law, such as "Christendom" and "every Christian power",[8] is in keeping with terminology found in key documents from the fifteenth and later centuries. The Doctrine of Discovery is more accurately termed the Doctrine of Christian Discovery.

7. Judge Catron's mention of "four centuries" prior to his era points back to the mid-fifteenth century, the time of numerous documents issued from the Vatican by

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[4] In an earlier era, "Law of Nations" was commonly used by international law commentators. Vattel provides an example: "In cases of doubt arising upon what is the Law of Nations, it is now an admitted rule among all European nations, that our common religion, Christianity, pointing out the principles of natural justice, should be equally appealed to and observed by all as an unfailing rule of construction" (Emmerich Vattel, *The Law of Nations*). Henry Wheaton provides a second case in point. In the preface to the third edition of his *Elements of International Law*, Wheaton wrote in 1845: "During the Middle Ages the Christian States of Europe began to unite and to acknowledge the obligation of an international law common to all who professed the same religious faith" and " ... The origin of the law of nations in modern Europe may thus be traced to two principle sources — the canon law and the Roman civil law". This preliminary study uses phrases such as "the Christian States of Europe", or "Christian nations of Europe" because they are in keeping with the actual terminology in use at the time of the development of the doctrine.

[5] Thomas Erskine Holland, *Studies in International Law* (Oxford: At the Clarendon Press, 1898).

[6] President Andrew Jackson appointed Judge Catron to the United States Supreme Court in March 1837. Thus, Catron, along with his influence and mindset, was moved to the highest court in the United States system.

[7] See footnote 1. Catron further declared the global scope of the Doctrine of Discovery and the Framework of Dominance: "That, from Cape Horn to Hudson Bay, it is the only known rule of sovereign power, by which the native Indian is coerced. Our claim is based on the right to coerce obedience. The claim may be denounced by the moralist. We answer, it is the law of the land."

[8] "Christian powers" refers to what were once known as the States members of the "family of nations". International law scholar Thomas Erskine Holland is quoted in *Webster's New International Dictionary of the English Language* as saying that the term family of nations "may be said to include the Christian nations of Europe and their offshoots in America, with the addition of the Ottoman Empire, which was declared by the treaty of Paris of 1856 to be admitted to the 'concert Europeen'. Within this charmed circle, to which Japan also has now established her claim to be admitted, all states, according to the theory of international law are equal". The same volume provides the following definition: "Family of nations. The aggregate of states (orig. the Christian nations of Europe) which, as a result of their historical antecedents, have inherited a common civilization, and are at a similar level of moral and political opinion, or have been recognized by those states as on that level."

the Holy See, notably the papal bulls *Dum diversas* and *Romanus Pontifex*. Those decrees are part of the record of the genesis of competing claims by Christian monarchies and States in Europe to a right of conquest, sovereignty and dominance over non-Christian peoples, along with their lands, territories and resources, during the so-called Age of Discovery.[9]

8. In 1917, the Carnegie Institution published Frances Gardiner Davenport's *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, a work that provides insight into the semantics of so-called discovery, and an international Framework of Dominance to which indigenous peoples have been and are still being subjected, in violation of their individual and collective human rights.[10] As we shall demonstrate, the category "newly discovered lands" includes the lands of indigenous peoples categorized at that time by various Christian powers of Europe as non-Christians, for example, "heathens", "pagans", "gentiles" and "infidels".[11]

9. The papal bull *Romanus Pontifex*, issued in 1455, serves as a starting point to understand the Doctrine of Discovery, specifically, the historic efforts by Christian monarchies and States of Europe in the fifteenth and later centuries to assume and exert rights of conquest and dominance over non-Christian indigenous peoples in order to take over and profit from their lands and territories. The overall purpose of these efforts was to accumulate wealth by engaging in unlimited resource extraction, particularly mining, within the traditional territories of indigenous nations and peoples. The text of *Romanus Pontifex* is illustrative of the doctrine or right of discovery. Centuries of destruction and ethnocide resulted from the application of the Doctrine of Discovery and framework of dominance to indigenous peoples and to their lands, territories and resources.[12]

10. Written by Pietro da Noceto, private secretary and confidant of Pope Nicolas V, the decree *Romanus Pontifex* begins by saying that the document was issued for "a perpetual remembrance". It was to be remembered, in other words, in perpetuity.[13] The Roman pontiff was said to be empowered to ordain and dispose of "those things which he sees will be agreeable to the Divine Majesty and by which he may bring the sheep entrusted to him by God into the single divine fold, and may acquire for them the reward of eternal felicity, and obtain pardon for their souls". This language is suggestive of religious conversion, and the document goes on to reveal the Framework of Dominance to be applied to non-Christian lands previously unknown to Western Christendom.

11. That *Romanus Pontifex* constituted and projected into the world a Framework of Dominance, conversion and violence is revealed by terms such as "vanquish".

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[9] See Francis Gardiner Davenport, *European Treaties*. Quotations in paras. 8-17 below are from Davenport.

[10] The Doctrine of Discovery emerged out of an era when non-Christian peoples were not considered to be human. As Henry Wheaton stated in his *Elements of International Law*, "the heathen nations of the other [non-Christian] quarters of the globe were the lawful spoil and prey of their civilized conquerors".

[11] The terms "barbarians" and "savages" were also used. See also footnotes 3 and 7 above.

[12] For the purpose of this study, "ethnocide" includes the destructive consequences to peoples that follow from their removal from their traditional lands and territories, in violation of their human integrity and their human rights.

[13] The concept of "perpetual remembrance" coincides with the fact that Pope Nicholas V made his grant "forever".

The objectives of the Holy See and the Portuguese monarch were more likely to come to pass, said Pope Nicholas, "if we bestow suitable favours and special graces on those Catholic kings and princes, who ... restrain the excesses of the Saracens and of other infidel enemies of the Christian name [and] ... vanquish ... their kingdoms and habitations, though situated in the remotest parts unknown to us". The document praises vanquishing actions that "subject" non-Christians to the Catholic kings' and princes' "own temporal dominion, sparing no labour or expense". Thus, the Holy See decreed a vanquishing violence to achieve dominance and control, as lords, over non-Christian peoples, and possession of their lands, territories and resources.

12. *Romanus Pontifex* further demonstrates the Framework of Dominance with Pope Nicholas's mention of Prince Henry of Portugal as a "true soldier of Christ" who "would best perform his duty to God" if he "might ... be able ... to subdue certain gentile or pagan peoples ... and to preach and cause to be preached to them the unknown but most sacred name of Christ".[14] To endeavour to use violence and religious conversion to "subject" non-Christian peoples is to work towards their dominance and subjugation.

13. Portuguese ships, said the papal bull, had explored and taken possession of very many harbours, islands and seas, eventually arriving at "the province of Guinuea [sic]". As a result, the Portuguese had "taken possession of some islands and harbours and the sea adjacent to that province". Eventually, the Portuguese voyagers "came to the mouth of a certain great river commonly supposed to be the Nile". They then waged war "for some years against the [gentile or pagan] peoples of those parts in the name of the said King Alfonso and of the infante".

14. *Romanus Pontifex* further explains that as a result of years of war other islands in western Africa "were subdued and peacefully possessed" along "with the adjacent sea". King Alfonso and Prince Henry had explored, "acquired and possessed such harbours, islands, and seas ... as the true lords of them ..." and had "ordained that none ... should presume to sail to the said provinces or to trade in their ports or to fish in the sea" without their licence, permission and payment of tribute. With the Holy See's blessing and sanction, King Alfonso assumed a right of complete control as against "gentile or pagan" peoples, and over their lands, territories and resources. Such presumptions or claims by potentates, States, and their successors, of a right to "grant", "discover", "subdue", "acquire" and "possess" and permanently control non-Christian indigenous peoples, along with their lands, territories and resources, is what this preliminary study refers to as the Framework of Dominance.

15. Pope Nicholas authorized King Alfonso to assume and take control over non-Christian lands because the Holy See "had formerly ... [for example, in the bull

[14] That the term "subdue" invokes and carries the Framework of Dominance is revealed by its definition: "to conquer by force and by superior power and bring into subjection: vanquish, crush". "Subdued" is "brought under control by or as if by military force" (*Webster's Third New International Dictionary of the English Language Unabridged, 1993*). The one who subdues or who has subdued is the one who assumes a position of dominance. "Dominance" brings us to "dominant position in an order of forcefulness". And, finally, "dominant" brings us to "commanding, controlling, or having supremacy or ascendancy over all others by reason of superior strength or power". Thomas Hobbes, in *Leviathan*, declared that "Dominion acquired by conquest or victory in war, is that which some writers call *despotical*". He traces this to the Greek word signifying "a lord or master", and says despotic dominion is that "of the master over his servant".

*Dum diversas* of 1452] granted among other things free and ample faculty[15] to the aforesaid King Alfonso — to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and [the right] to convert them [those things] to his and their use and profit ...". This "faculty" granted by the Holy See to King Alfonso to "apply and appropriate to himself" the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods, is a papal licence for the forced taking of all indigenous lands and territories in the regions located, and to engage in unlimited resource extraction for the monarch's "use and profit". In this context, the secular meaning of "convert" is "to appropriate dishonestly or illegally" that which belongs to another".[16] To make the forced appropriation seem "lawful" and "right", Pope Nicholas declared that because the Apostolic See had previously issued the "faculty" to engage in such work, and because the king had thereby "secured the said faculty", "the said King Alfonso ... justly and lawfully has acquired and possessed, and doth possess, these islands, lands, harbours, and seas, and they do of right belong to ... the said King Alfonso and his successors ...".

16. Thus, *Romanus Pontifex* clearly illustrates the pattern of contemporary claims by States to rights of conquest and dominance with regard to indigenous peoples, their lands, territories and natural resources. It is for this reason that the papal bull *Romanus Pontifex* serves as a powerful template illustrative of the Framework of Dominance that lies at the root of the violations of indigenous peoples' human rights, both individual and collective.

17. As noted, the "right of conquest" granted by Pope Nicholas in *Romanus Pontifex* is made forever: "And by force of those and the present letters [papal bulls] of faculty the acquisitions already made, and what hereafter shall happen to be acquired ... forever of right do belong and pertain, to the aforesaid king and his successors and to the infante, and that the right of conquest ... has belonged and pertained, and forever of right belongs and pertains, to the said King Alfonso, his successors, and the infante, and not to any others". Mention of King Alfonso's "successors" refers to rights of conquest and dominance being transferable by treaty between the States of Europe, otherwise known as the "family of nations". Many

[15] In this context the word "faculty" means "ability to act or do". Thus, Pope Nicholas said that the Holy See, by its previous authorization, had granted to King Alfonso the ability to "invade, search out [and] vanquish".

[16] *Webster's Third New International Dictionary*. To invade and purport to convert the lands of other peoples is to engage in an act or acts of "conversion". Black's Law Dictionary (Fifth ed.) provides the following definition of "conversion": "An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Any unauthorized act which deprives an owner of his property permanently or for an indefinite time. Unauthorized and wrongful exercise of dominion and control over another's personal property, to the exclusion of or inconsistent with rights of owner". From an indigenous peoples' perspective the assumptions and acts of Christian European powers to "invade, capture, vanquish, and subdue them" and to take away all their goods "both movable and immovable" were unauthorized and wrongful under indigenous systems of law and inconsistent with the inherent and original rights of the owners.

modern States of the world are the political successors of such claimed rights of conquest and dominance based on the Doctrine of Discovery.

## IV. The Framework of Dominance

18. The bull *Romanus Pontifex* — along with all other such Vatican documents and royal charters — provides evidence of the Doctrine of Discovery used by the Christian States of Europe and their successors in the Americas and elsewhere to promote on a global scale a framework of dominance and the theft of indigenous peoples' lands, territories, and resources, under the disguise of activities that are deemed "just" and "lawful". The dominance framework was acknowledged in a working definition of "indigenous peoples" set out in the early 1970s:

> Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons or a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant.[17]

19. Another example will further illustrate this point. In 1995, the Office of the United Nations High Commissioner for Human Rights issued a fact sheet, in the introduction to which we find: "Indigenous or aboriginal peoples are so called because they were living on their lands before settlers came from elsewhere".[18] The phrase "before settlers came" is an acknowledgment that indigenous peoples were originally living on their own lands when other people arrived and claimed to be "dominant through conquest, occupation, settlement, or other means". The fact sheet also refers to the "settlers" as "the new arrivals" who became "dominant" through "conquest, occupation, settlement or other means". This mention of "dominant" and "conquest" acknowledges a history of invasion and forced imposition.

20. Elsewhere, the fact sheet again recognizes claims of dominance and the taking of indigenous lands by force: "Throughout human history, whenever dominant neighbouring peoples have expanded their territories or settlers from far away have acquired new lands by force, the cultures and livelihoods — even the existence — of indigenous peoples have been endangered". Referring to non-indigenous peoples being "dominant" over indigenous peoples, and to "settlers" acquiring indigenous lands "by force" pinpoints what has resulted in the cultures and livelihoods — even the existence of indigenous peoples being endangered. Issues of ethnocide[19] and

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[17] See Patrick Thornberry, *Human Rights and Indigenous Peoples* (Manchester University Press, 2002). See also the preliminary report of the Special Rapporteur of the Commission on Human Rights, José Martínez Cobo, of 29 June 1972 (E/CN.4/Sub.2/L.566).

[18] Fact Sheet No. 9 (Rev. 1), entitled "The Rights of Indigenous Peoples", relating to the Programme of Activities for the International Decade of the World's Indigenous People (1995-2004) (General Assembly resolution 50/157, annex).

[19] See footnote 12 above.

linguicide[20] are included in the reference to the existence of indigenous peoples being endangered by those monarchies and States claiming "effective dominance" over them, their lands, and territories, in violation of indigenous peoples' individual and collective human rights.

21. The Special Rapporteur of the Commission on Human Rights, José Martinez Cobo, in his final report on the problem of discrimination against indigenous populations, employed key concepts that identify and acknowledge dominance as the context of indigenous peoples' issues:

> Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[21]

22. In the above working definition we find the same conceptual pattern mentioned previously. The term "pre-invasion" acknowledges the invasion of indigenous peoples' territories. "Pre-colonial" acknowledges the patterns of colonialism and colonization that have had a negative impact on indigenous peoples, their lands, territories and resources. The statement "societies now prevailing on those [indigenous] territories" views non-indigenous societies as presuming to have a "superior force or influence" over indigenous peoples and their territories. Finally, referring to indigenous peoples as "non-dominant" acknowledges the fact that invading societies claim dominance over indigenous peoples in violation of their individual and collective human rights.

## V. The Doctrine of Discovery and the United States of America

23. In this section we shall focus in detail on United States federal Indian law as a prototypical example of the application of the Doctrine of Discovery and the Framework of Dominance to indigenous nations and peoples. This information will illustrate the extent to which national laws, particularly property laws, regarding indigenous peoples, have rested and continue to rest on the Doctrine of Discovery and the Framework of Dominance.[22]

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[20] As used in this preliminary study, "linguicide" refers to the history of laws and policies implemented in an effort to destroy the languages of indigenous peoples.

[21] "Study on the problem of discrimination against indigenous populations" (E/CN.4/Sub.2/476 and addenda; E/CN.4/Sub.2/1982/2 and addenda; E/CN.4/Sub.2/1983/21 and addenda; available from www.un.org/esa/socdev/unpfii/en/spdaip.html).

[22] In United States federal Indian law the Framework of Dominance is commonly referred to as "the plenary power doctrine". Within the United States Constitution, the regulation of Government relations with American Indians falls exclusively to the federal Government, and not to the state Governments. The authority of Congress to pass legislation dealing with American Indian affairs is often called "the plenary power of Congress". This leads to the common expression "Congress has plenary power over Indian affairs". The Framework of Dominance is expressed through the statement "Congress has plenary power over Indian nations or tribes" (see Wilkins, *American Indian Sovereignty*).

24. The United States federal Indian law system comprises thousands of statutes, a voluminous body of case law, hundreds of treaties, both ratified and unratified, and more than 200 years of federal Indian policy development.[23] This preliminary study of the Doctrine of Discovery, however, will remain narrowly focused on the conceptual starting point or premise of that overall system as embodied in the United States Supreme Court ruling *Johnson v. McIntosh*.[24]

25. The premise of the federal Indian law system has become even more problematic in recent years because of recently disclosed evidence of fraud in the *Johnson* case. The case was feigned; it was the result of an act of collusion between the two parties, "for effect".[25] In 1774 and 1775, respectively, the Illinois and Wabash Land Companies purchased lands directly from the Illinois and Piankeshaw Indian nations in violation of a bar the British crown had placed on such land purchases by the Royal Proclamation of 1763. The two land purchases were made from the two free and independent Indian nations just prior to the Declaration of Independence and the Revolutionary War between the newly declared United States and Great Britain. Nearly 50 years after those land purchases, two relatives and heirs of Thomas Johnson, one of the original investors in the land purchases, filed suit in United States District Court for the District of Illinois. The attorneys for the plaintiffs had gone in search of a defendant, whom they found in the person of William McIntosh. The attorneys for the plaintiffs hired the attorneys for the defendant, Mr. McIntosh.[26]

26. In addition, Chief Justice John Marshall (1755-1835) had large real estate holdings (as did his family and friends) that would have been affected if the case had been decided contrary to those interests.[27] Rather than remove himself from the case, however, the Chief Justice wrote the decision for a unanimous United States Supreme Court.[28]

27. The newly formed United States needed to manufacture an American Indian political identity and concept of Indian land title that would open the way for the United States in its westward colonial expansion. The principle that the United

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[23] See generally Felix Cohen, *Handbook of Federal Indian Law*.

[24] The beginning of United States federal Indian case law is commonly known as the Marshall Trilogy, which consists of three Supreme Court rulings handed down under the leadership of Chief Justice John Marshall: *Johnson's Lessee v. McIntosh* 8 Wheat. 543 (1823); *Cherokee Nation v. Georgia* 30 U.S. 1 (1831); and *Worcester v. Georgia* 31 U.S. 515 (1832). A discussion of all three cases is beyond the scope of this preliminary study. However, for now it is important to note that in *Worcester v. Georgia*, Chief Justice Marshall modified the view he had expressed in the *Johnson* ruling, as it applied to individual States of the United States. In *Worcester*, for instance, Marshall said that the Doctrine of Discovery could not "annul the previous rights of those who had not agreed to it". In other words, "discovery" could not cause Indian rights to cease to exist. The principle of discovery, Marshall further declared, "could not affect the rights of those already in possession" of the land. Space does not permit a discussion of the implications of these statements. In any case it is the *Johnson* ruling rather than *Worcester* that has been repeatedly characterized as conceptually laying down the foundation of Indian title in the United States of America.

[25] Lindsay Robertson, *Conquest by Law*. The phrase "for effect" refers to an act of collusion by two parties to have a particular effect on a court. The two sides were only pretending to have a dispute in order to get the case before the United States court system.

[26] Robertson, *Conquest by Law*.

[27] Ibid.

[28] Peter d'Errico, "John Marshall: Indian Lover?".

States Supreme Court devised for this purpose in the *Johnson* ruling was "that discovery gave title to the government, by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession".[29] Based on the concept of "discovery", the Supreme Court constructed an Indian title of "mere occupancy". In keeping with this concept, it has often been argued that the Indian title of "occupancy" is merely a temporary right, inferior and subject to the absolute title and ultimate dominion of early Christian European powers, and later State actors such as the United States.[30]

28. To illustrate the origin of the "principle" of "discovery", Marshall examined the language of the John Cabot charter and a number of other royal charters issued by the British crown:

> No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.[29]

29. The above quoted language from King Henry VII's charter to John Cabot and his sons traces directly back to the long tradition of the Vatican papal bulls mentioned above. With that language, the British crown was acting on the view that previous papal grants to Portugal and Spain could not rightfully bar the British crown from voyaging and appropriating lands of "the heathen and infidel" which before this time "have been unknown to all Christian people". The *Johnson* ruling continues by saying that the Cabot charter constitutes "a complete recognition" of the "principle" or doctrine of discovery:

> In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle [of discovery] which has been mentioned. The right of discovery given by this commission, is confined to countries "then unknown to all Christian people"; and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.[29]

30. The Supreme Court's language once again invokes the Framework of Dominance. Earlier in the *Johnson* decision Marshall also identified that same framework through his use of the concept "dominion":

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been

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[29] *Johnson v. McIntosh* at 576.

[30] This concept was referenced in the United States legal brief in *Tee-Hit-Ton* when the United States attorneys argued that "a right of occupancy in the Indians" was "retained by the Indians only by the grace of the sovereign". See paras. 41-49 below.

understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.[31]

31. As the United States Supreme Court viewed the matter in *Johnson*, the English royal charters expressed the doctrine that "Christian people", on the basis of a claim of "discovery", had asserted a right to take possession of any lands inhabited by "natives, who were heathens", meaning non-Christians. The Political philosopher Thomas Hobbes stated that "the right of possession is called Dominion".[32] Thus, asserting "a right to take possession" is simply another way of saying "asserting a right of dominion" or dominance.[33]

32. In the *Johnson v. McIntosh* ruling, the United States Supreme Court claimed that the original rights of American Indians "to complete sovereignty, as independent nations" had been "necessarily diminished" by the right of discovery. This "right" of "discovery", said the Court, was confined to countries "unknown to Christian people". The Supreme Court claimed, in other words, that Christian people locating lands in the Americas that until then had been "unknown to Christian people" had ended the right of American Indian nations to be free and independent. On the basis of the above language, the United States Supreme Court used the Doctrine of Discovery to prevent the application of the first principle of international law to American Indian nations and their traditional territories: "The authority of a nation within its own territory is absolute and exclusive".[34] To give themselves unfettered access to the lands, territories and resources of indigenous peoples, the Christian States of Europe and later State actors considered this principle applicable only to themselves.

33. No one could sensibly argue against the idea that the existence of American Indian nations and peoples was originally free of the Doctrine of Discovery and Christian European claims and assertions of dominance.[35] Justice Joseph Story (1779-1845) revealed the argument against that original free existence when he wrote "As infidels, heathens, and savages", the Indians "were not allowed to possess the prerogatives belonging to completely sovereign independent nations".[36] Once the concepts of "discovery" and "ultimate dominion" (traced back to papal bulls such as *Romanus Pontifex*) were institutionalized in United States law and policy, this resulted in the imposition of a Framework of Dominance over indigenous nations and peoples. This enabled the United States Government to appropriate and grant away Indian lands, territories and resources, with impunity, in violation of indigenous peoples' individual and collective human rights.

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[31] *Johnson v. McIntosh* at 574.

[32] Thomas Hobbes, *Leviathan*, chap. XVI.

[33] The United States usage of "ultimate dominion" and "right of possession" as property law concepts brings the discussion back to William Brandon's etymology of *dominium*: "unrestricted power, absolute dominium, lordship, tyranny, despotism. Political power grown from property — dominium — was, in effect, domination" (see footnote 2 above).

[34] Francis Wharton, *A Digest of International Law of the United States*, vol. I.

[35] Spanish theologian Francisco Vitoria is considered by many to be the "father" of international law. During his lectures at the University of Salamanca he examined the issue of "title by discovery". Not much needed to be said about that form of title, he concluded, because "the barbarians were the true owners [of their lands], both from the public and private standpoint". The adherents and proponents of the Doctrine of Discovery and the Framework of Dominance have ignored Vitoria's powerful analysis on this point. James Brown Scott, *The Catholic Conception of International Law*.

[36] Joseph Story, *Commentaries on the Constitution of the United States*.

## VI. *Terra nullius*, *terra nullus* and the *Johnson v. McIntosh* ruling

34. There are two terms that have been used against indigenous peoples historically, both of which mean "devoid of human beings". The two terms have resulted in the dehumanization of indigenous peoples. The first of these terms is *terra nullius*, a category applied by Roman lawyers to enemy lands and places such as desert islands.[37] The second term is *terra nullus*, which, according to Francis Lieber, the first American political scientist, was based on the fact that the original indigenous inhabitants of a geographical area during the so-called Age of Discovery were not baptized as Christians.

35. Francis Lieber (1800-1872) was a German-American who emigrated to the United States in 1827 and became one of the foremost political scholars of the nineteenth century.[38] Lieber identified the doctrine of *terra nullus*, which referred to a land inhabited by heathens, pagans, infidels or unbaptized persons, whom Christians treated in a fundamental sense as not existing. The concept of *terra nullus* led to the view that lands inhabited by non-Christians were vacant or "unoccupied lands" and therefore open to a right of possession by Christians. "Paganism", wrote Lieber, which meant being unbaptized, "deprived the individual [non-Christian] of those rights which a true ... morality considers inherent in each human being".

36. In an 1888 essay, Burke Aaron Hinsdale (1837-1900) documented that the Right of Discovery was founded "on the principle that what belongs to no one [may] be appropriated by the finder". Following Lieber's thinking, Hinsdale noted that the argument became effective only when supplemented by the Church definition of *nullius*. The Church definition, said Hinsdale, "supplied the necessary premise". "Grant that res nullius is the property of the finder; that an infidel is nullius [non-existing]; that the American [Indian] savage is an infidel [nullius, or non-existing] and the argument is complete". Hinsdale said that this argument, premised on the unbaptized status of the original inhabitants of "discovered" lands, was "the *origin* of the Right of Discovery, the criterion to which the nations that divided the New World appealed in territorial controversies, and the ultimate ground of title throughout the United States". Here Hinsdale referenced the *Johnson v. McIntosh* ruling. Hinsdale said that the Right of Discovery formed "the ultimate ground of title throughout the United States".[39]

37. United States Supreme Court Justice Joseph Story was a contemporary of Francis Lieber. For a time, the two men moved in the same intellectual circles, and Story contributed more than 120 pages to Lieber's *Encyclopaedia Americana*.[40] Justice Joseph Story also helped to decide the 1823 *Johnson v. McIntosh* case. One decade after the *Johnson* decision, in 1833, Story published his *Commentaries on the Constitution of the United States*, in which he examined the "origin and title to

[37] Steven T. Newcomb, *Pagans in the Promised Land*. Quotations in paras. 35 and 36 are from Newcomb unless otherwise identified.

[38] Francis Lieber is credited with first conceiving the Institut de droit international. He became an adviser to President Abraham Lincoln during the American Civil War, and worked with the Union War Department and President Lincoln to draft legal guidelines for the Union Army. His code, known as the Lieber Code, was eventually adopted by other military organizations in the world and went on to become the basis of the laws of war.

[39] B. A. Hinsdale, "The Right of Discovery".

[40] Story contributed unsigned works on natural law, American and English law to Lieber's *Encyclopaedia*.

the territory of the colonies", and wrote the following regarding the origin of European title in the Americas and the *Inter Caetera* papal bull of the fifteenth century:

> ... The Indians were a savage race, sunk in the depths of ignorance and heathenism. If they might not be extirpated for their want of religion and just morals, they might be reclaimed from their errors. They were bound to yield to the superior genius of Europe, and in exchanging their wild and debasing habits for civilization and Christianity they were deemed to gain more than an equivalent for every sacrifice and suffering. The Papal authority, too, was brought in aid of these great designs; and for the purpose of overthrowing heathenism, and propagating the Catholic religion, Alexander the Sixth, by a Bull issued in 1493, granted to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince.[41]
>
> 6. The principle, then, *that discovery gave title to the government, by whose subjects or by whose authority it was made, against all other European governments*,[42] being once established, it followed almost as a matter of course, that every government within the limits of its discoveries excluded all other persons from any right to acquire the soil by any grant whatsoever from the natives.[43] (emphasis added)

38. In the two paragraphs quoted above, Story made a direct connection between the *Inter Caetera* papal bull of 1493 and the right of discovery expressed in the *Johnson* decision.[44] Story thereby placed the *Johnson v. McIntosh* ruling — the starting point of United States federal Indian case law — not only in the context of the decree *Inter Caetera*, but in the larger context of the numerous Vatican documents issued to the Portuguese and Spanish crowns during the so-called Age of Discovery, including the framework of dominance found in the papal bulls *Dum diversas* and *Romanus Pontifex*.

39. On the basis of *terra nullus* and the Doctrine of Discovery, the United States Supreme Court stated in the *Johnson* decision that the [British] crown, had made

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[41] In a footnote Story wrote: "'*Ut fides Catholica, et Christiana Religio nostris praesertim temporibus exaltetur, &c., ac barbarae nationes deprimantur, et ad fidem ipsam reducantur,*' is the language of the Bull. 1 Haz. Coll. 3". The Latin translates: "Among other works well pleasing to the Divine Majesty and cherished of our heart, this assuredly ranks highest, that in our times especially the Catholic faith and Christian religion be exalted and everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself" (Davenport). The Latin *deprimantur* translates to both "overthrown" and "subjugated", thereby invoking the Framework of Dominance.

[42] The highlighted words are taken, verbatim and without quotation marks, directly from *Johnson v. McIntosh*.

[43] Here Story cited volume 3 of Chief Justice John Marshall's *A History of the Colonies* (3 Marshall, Hist. Col. 13, 14). Marshall's *History* was published in 1824 within months of the *Johnson v. McIntosh* ruling.

[44] That Story's citation of the 1493 papal bull was reflective of the framework of dominance is evident from the Latin text that he quoted from a papal bull issued by Pope Alexander VI. The pope, for example, called for non-Christian nations -- "barbarous nations" — to be "subjugated" and for the "propagation of the Christian empire" (Davenport). Additionally, the Holy See declared in the *Inter Caetera* bull, "We trust in Him from whom empires, governments, and all good things proceed" (Ibid.). That this sentence is consistent with the framework of dominance is revealed by the Latin translation of "governments" which is "*dominationes*".

"no distinction ... between vacant lands and lands occupied by Indians".[45] The Supreme Court claimed, in other words, that the British crown treated American Indian lands as if they were vacant lands. In *The International Law of John Marshall*, Benjamin Munn Ziegler explained the Court's statement about vacant lands as follows: "[o]ne of the oldest means by which nations have acquired territory has been through the discovery of previously unoccupied lands". In an explanatory note, Ziegler further said: "The term 'unoccupied lands' refers of course to lands in America which when discovered were 'occupied by Indians' but 'unoccupied by Christians'".[46]

40. George Grafton Wilson (1863-1951), a professor in the United States at Brown University, Harvard University, the Fletcher School of Law and Diplomacy, and the United States Naval War College, expressed the same point. On the basis of the *Johnson v. McIntosh* ruling, Wilson stated that "England, France, Holland, Portugal, and Spain alike maintained that discovery of lands previously unknown to Christian people gave the Christian discoverer the right to take possession".[47]

## VII. The Doctrine of Discovery in contemporary times

41. In the mid-twentieth century, the United States Supreme Court reaffirmed and embraced the Doctrine of Discovery. Five hundred years after the issuance of Romanus Pontifex, the United States Supreme Court handed down its decision in *Tee-Hit-Ton Indians v. The United States*.[48] The case had to do with the Tee-Hit-Ton people whose language is Tlingit, and whose "customs, laws, and traditions [are] similar to other Tlingit peoples" in what is now called Alaska.[49] In 1947, the United States Congress authorized the United States Secretary of Agriculture to sell the timber of the Tongass National Forest, a national forest that the Congress had established in an area that partly encompassed the traditional territory of the Tee-Hit-Ton and the Tlingit. On 20 August 1951, the United States Forest Service sold Ketchikan Pulp and Paper Company "the right to all harvestable in the Tongass National Forest, estimated at 1,500,000 cubic feet". Shortly thereafter, the Tee-Hit-Ton sued, arguing that they "were the sole owners of the land and water in dispute; that they had never sold or conveyed the land to any other party; and they asked for a judgment for the losses and damages from the Tongass taking, plus interest".[50]

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[45] *Johnson v. McIntosh* at 596. The quotation from Story in para. 37 above links to the doctrine of *terra nullius*.

[46] Benjamin Munn Ziegler, *The International Law of John Marshall*.

[47] George Grafton Wilson, "International Law and the Constitution", 13 B.U. L. Rev. 234 (1933). Wilson's statement "that discovery of lands previously unknown to Christian people gave the Christian discoverer the right to take possession" is in keeping with Thomas Hobbes's statement, already mentioned, that "the right of possession is called Dominion". In other words, "dominance".

[48] *Tee-Hit-Ton Indians v. The United States* 348 U.S. 272 (1955).

[49] David Wilkins, *American Indian Sovereignty and the U.S. Supreme Court*: "The area claimed by the Tee-Hit-Ton entailed approximately 357,802 acres of land and 150 square miles of water. They had inhabited the region for thousands of years, and the area in question was recognized as theirs by neighboring tribes". The traditional territory of the Tlingit exists within the temperate rainforest of the south-east Alaska coast and the Alexander Archipelago. The Inland Tlingit inhabit the far north-western part of what is now known as the province of British Columbia and the southern Yukon Territory of Canada.

[50] Wilkins, *American Indian Sovereignty*.

42. Eventually, United States government attorneys filed a brief with the Supreme Court that was based in part on the Doctrine of Discovery and the era of the Vatican papal bulls; in it they argued that it was a well-recognized principle in international law that "the lands of heathens and infidels" were open to acquisition (taking) by "Christian nations".[51] A few comments will place the United States legal argument about "Christian nations" in context: until 1856, there existed a collective international political identity, comprising different monarchies and States, called variously by such names as "Christendom", "the Christian common wealth" and "the Family of Nations" ("the Christian nations of Europe and their offshoots in America"). In keeping with this history, the United States attorneys began their "summary of argument" with the *Johnson* decision: "It is a well established principle of international law that with respect to the lands of this continent discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession (*Johnson v. McIntosh*, 8 Wheat. 543, 573)". The attorneys continued: "... the discovering nations asserted in themselves, by virtue of the principle of discovery, the complete and exclusive title to the land — subject only to a right of occupancy in the Indians, such right being retained by the Indians only by the grace of the sovereign".[51]

43. Under the heading "Argument" the United States attorneys referred back to the centuries-long era of "the Christian nations of Europe." They included a discussion of the era of the papal bull Romanus Pontifex: "Prior to the great era of discovery beginning in the latter part of the fifteenth century, the Christian nations of Europe acquired jurisdiction over newly discovered lands by virtue of grants from the Popes, who claimed the power to grant to Christian monarchs the right to acquire territory in the possession of heathens and infidels."[52]

44. The attorneys continued with the following line of argument in *Tee-Hit-Ton* based on the Vatican papal bulls:

> For example, in 1344, Clement VI had granted the Canary Islands to Louis of Spain upon his promise to lead the islanders to the worship of Christ, and, following the discovery of the New World by Columbus, Alexander VI in 1493 and 1494 issued bulls granting to Spain all lands not under Christian rule west of a line 100 leagues west of the Azores and Cape Verde Islands. ... The latter papal grant, because of the breaking down of the papal authority and the vastness of the territory covered, was not accepted by the other nations or even greatly relied upon by Spain, and it was necessary for the civilized, Christian nations of Europe to develop a new principle which all could acknowledge as the law by which they should regulate, as between themselves, the right of acquisition of territory in the New World, which they had found to be inhabited by Indians who were heathens and uncivilized according to European standards.[51]

45. Justice Stanley Forman Reed delivered the majority decision for the United States Supreme Court in *Tee-Hit-Ton Indians v. The United States*. However, before explaining the Court's ruling in *Tee-Hit-Ton*, it is necessary to first mention the 1946

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[51] Brief for the United States in *Tee-Hit-Ton Indians v. The United States*.

[52] Here the United States attorneys cited Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926).

Supreme Court case *Alcea Band of Tillamooks v. The United States*.[53] In the *Alcea Band* case, the majority of the Supreme Court decided that the Alcea Band of Tillamook Indians in Oregon were entitled to monetary compensation for a taking of their ancestral lands by the United States Government. However, Justice Reed, who wrote the minority opinion, disagreed. Justice Reed relied on the *Johnson v. McIntosh* ruling of 1823 to make his argument that the Alcea Band of Tillamook Indians were not entitled to monetary compensation for a taking of their ancestral lands by the United States Government.

46. As the main support for his argument in the *Alcea Band* case, Justice Reed characterized the *Johnson v. McIntosh* ruling as having advanced the theory that the "discovery" of Indian lands "by Christian nations gave them sovereignty over and title to the lands discovered". This, of course, matches Judge Catron's claim in *State v. Foreman* that it was "the law of Christendom that discovery gave title to assume sovereignty over, and to govern the unconverted natives".[54]

47. When Justice Reed wrote the majority opinion for the United States Supreme Court in *Tee-Hit-Ton*, he concurred with the argument made by the United States attorneys. He also applied the same line of reasoning regarding the Doctrine of Discovery that he had previously expressed in *Alcea Band of Tillamooks*. He said that it was "well settled" that American Indians held claim to lands in North America "after the coming of the white man, under what is sometimes termed Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants". He further said that "this right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians". Mention of "conquest" references the Framework of Dominance, and Justice Reed went on to say: "This position of the Indians has long been rationalized under the theory that discovery and conquest give the conquerors sovereignty over and ownership of the lands thus obtained".[55]

48. In his *Elements of International Law*, under "Rights of Property", Henry Wheaton wrote the following which, based on Justice Reed's citation, reveals the context of the United States Supreme Court's ruling in *Tee-Hit-Ton*:

> The Spaniards and the Portuguese took the lead among the nations of Europe, in the splendid maritime discoveries in the East and the West, during the

[53] 329 U.S. 40 (1946).

[54] See footnote 1 above.

[55] Justice Reed referred to *Johnson v. McIntosh* and to Henry Wheaton's *Elements of International Law*. Henry Wheaton (1785-1848) was an American lawyer and diplomat. He was the reporter of decisions for the United States Supreme Court when it made the *Johnson v. McIntosh* decision. He published the first edition of his *Elements of International Law* in 1836. Justice Stanley Reed, in the *Tee-Hit-Ton* decision, cited chapter V of Wheaton's *Elements*. However, there is nothing in chapter V that would be of relevance to the issue in *Tee-Hit-Ton*. It is in chapter IV, section 5, of *Elements* that Wheaton dealt with historical information about rights of property in international law. In that discussion, Wheaton covered the *Johnson v. McIntosh* ruling, the papal bull of 1493, the royal charters of England, and the doctrine or right of discovery. He also italicized the word "Christian" in the same manner that Chief Justice Marshall had italicized "Christian people" in the *Johnson* ruling. See Newcomb, *Pagans in the Promised Land*.

> fifteenth and sixteenth centuries. According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the Christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims ... Thus the bull of Pope Alexander VI reserved from the grant to Spain all lands, which had been previously occupied by any other *Christian* [original emphasis] nation; and the patent granted by Henry VII of England to John Cabot and his sons, authorized them "to seek out and discover all islands, regions, and provinces whatsoever, that may belong to heathens and infidels"; and "to subdue, occupy, and possess these territories, as his vassals and lieutenants". In the same manner, the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to "discover such remote and barbarous lands, countries, and territories, not actually possessed by any Christian prince or people, and to hold, occupy, and enjoy the same, with all their commodities, jurisdictions, and royalties". It thus became a maxim of policy and of law, that the right of the native Indians was subordinate to that of the first Christian discoverers, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives.[56]

49. That the Doctrine of Discovery is still being used as an active legal principle by the United States Supreme Court in the twentieth-first century is revealed in the case *City of Sherrill v. Oneida Indian Nation of New York*[57] decided in March 2005, exactly 50 years after the *Tee-Hit-Ton* ruling. The case involved a dispute over taxation of ancestral lands of the Oneida Indian Nation. During oral arguments, it became clear that the case would hinge on whether, in the opinion of the Court, the Oneida Indian Nation "has sovereignty status" with regard to the ancestral lands the Oneida Nation had reacquired. To contextualize the Court's decision and to decide the sovereign status of the Oneida Indian Nation, the Supreme Court relied upon the Doctrine of Discovery. This is revealed in footnote number one of Justice Ruth Bader Ginsberg's decision for the Court majority: "Under the 'Doctrine of Discovery'", wrote Justice Ginsberg, "... fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign — first the discovering European nation and later the original states and the United States". As documented by this preliminary study, the Supreme Court's reference to the Doctrine of Discovery places the context for the Court's decision in *Sherrill v. Oneida Indian Nation of New York* within the Framework of Dominance, dating back to the era of the Vatican papal bulls.

## VIII. Conclusion

50. This preliminary study has documented that for more than 500 years the Doctrine of Discovery has been global in scope and application. At least two Governments other than the United States, Canada and Australia, have cited the *Johnson v. McIntosh* ruling to enforce the Doctrine of Discovery. When they have done so they have cited the Doctrine of Discovery and the Framework of Dominance. Non-indigenous legal scholars and State actors have interwoven the Doctrine of Discovery into international and domestic law. Within the context of the

[56] Wheaton, *Elements of International Law*, 3d ed.

[57] *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478, 148384 (2005).

United States, such persons include Chief Justice John Marshall, Justice Joseph Story, Henry Wheaton, Justice John Catron, Francis Lieber, B. A. Hinsdale, Alpheus Snow, George Grafton Wilson, Justice Stanley Reed, the United States attorneys who wrote the legal brief filed for *Tee-Hit-Ton Indians v. The United States*, and Justice Ruth Bader Ginsberg. They all relied upon the Doctrine of Discovery that, as this preliminary study has demonstrated, is rooted in and perpetuates the Framework of Dominance passed down, from generation to generation, from the era of Christendom and the Vatican papal bulls.[58]

## IX. Recommendation

51. The information and material presented in this preliminary study of the international construct known as the Doctrine of Discovery indicates the need for further study and review, and for a more comprehensive assessment and exploration of issues raised here on the violations of indigenous peoples' inherent rights, particularly as recognized in the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, we recommend that an international expert group meeting be convened to discuss in detail the findings and implications of this preliminary study of the Doctrine of Discovery and to present its findings to the Permanent Forum on Indigenous Issues at its annual session.

[58] Justice Joseph Story, in particular, was specific in his use of concepts that invoke the Framework of Dominance. He said, for example, that "the European discoverers claimed and exercised the right to grant the soil, while yet in possession of the natives, subject however to their right of occupancy; and the title so granted was universally admitted [by the European discoverers] to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treatises of public law, it was a transfer of *plenum et utile dominium*". This, then, takes us back to the etymology of such terms as discussed in footnote 2 above. Story's use of the secular term "European discoverers" is explained by Lindley in *The Acquisition and Government of Backward Territories*: "Later on the distinction was drawn between lands already occupied by Europeans and lands not so occupied, although in effect this was the same as the earlier distinction between Christian and non-Christian lands."

# Annex

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Item 3 of the provisional agenda*
**Discussion of the special theme for the year "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples"**

# Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples

## Report of the international expert group meeting

*Summary*

The present report provides an overview of the issues discussed at the international expert group meeting on the theme "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples", which was held from 12 to 14 January 2010 at United Nations Headquarters in New York. The report focuses on the conclusions and recommendations of the expert meeting to the Permanent Forum.

* E/C.19/2010/1.

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# I. Introduction

1. At its eighth session in May 2009, the Permanent Forum on Indigenous Issues recommended that the Economic and Social Council authorize a three-day international expert group meeting on the theme: "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples", and requested that the results of the meeting be reported to the Permanent Forum at its ninth session. At its regular session on 30 July 2009 (decision 2009/253), the Economic and Social Council decided to authorize the expert group meeting, and requested that the results of the meeting be reported to the Permanent Forum at its ninth session, in April 2010. The workshop was organized by the secretariat of the Permanent Forum.

# II. Organization of work

## A. Attendance

2. The following Permanent Forum members attended the meeting: Victoria Tauli-Corpuz; Carlos Mamani Condori; Tonya Gonnella Frichner; Pavel Sulyandziga.

3. The following invited experts participated in the meeting: Kanyinke Sena (Africa); Jelena Poranger (Arctic); Myrna Cunningham (Central, South America and the Caribbean); Anna Naikanchina (Eastern Europe, Russian Federation, Central Asia and Transcaucasia); John Bamba (Asia); and Jeannette C. Armstrong (North America). The invited expert from the Pacific was unable to attend.

4. The meeting was attended by observers from departments, agencies, funds and programmes of the United Nations system, observers from other intergovernmental organizations, non-governmental organizations (NGOs) and Member States. The list of participants is contained in annex II.

## B. Documentation

5. The participants had before them a draft programme of work and documents prepared by participating experts. The documentation is available on the website of the secretariat of the Permanent Forum at http://www.un.org/esa/socdev/unpfii/en/EGM_DCI.html.

## C. Opening of the meeting

6. At the opening of the meeting, the Assistant Secretary-General for Policy and Coordination and Inter-Agency Affairs and Secretary of the United Nations system Chief Executives Board for Coordination, Thomas Steltzer, made an opening statement on behalf of the Department of Economic and Social Affairs.

### D. Election of officers

7. Tauli-Corpuz was elected Chair of the meeting and Antti Korkeakivi of the Office of the United Nations High Commissioner for Human Rights was elected Rapporteur.

### E. Adoption of the conclusions and recommendations

8. On 14 January 2010, the meeting adopted, by consensus, the conclusions and recommendations contained in section IV below.

### F. Closure of the workshop

9. The meeting was closed after the conclusions and recommendations were adopted on 14 January 2010.

## III. Highlights of the discussion

10. Participants pointed out that economic liberalism, which promotes the idea that sustained economic growth, measured by the gross domestic product (GDP), is the driver of human progress and development, is the product of a particular world view and its interpretation and implementation often reflect the culture and values of the dominant society. This economic ideology, packaged as the Washington Consensus during the past three decades, pushes for trade liberalization and export-led growth, the liberalization of financial markets, deregulation and privatization. While it is viewed as a framework for addressing the challenges of global and national development, its promotion of debt-dependence, export-orientation and production and consumption beyond ecological limits has resulted in untenable inequity and injustice and the destruction of the diverse economic systems of indigenous peoples. Since colonization, the ability of indigenous peoples to maintain their responsibility as custodians of their lands has been seriously inhibited. The dominant models of development have compromised indigenous peoples in every aspect of their daily lives, including through the imposition of large infrastructure projects on their lands without their consent. This has generated poverty and severe inequality, massive environmental devastation and human rights violations. The serious rupture to the fabric of social life in indigenous communities as manifested in family breakdowns, alcoholism, and suicide among young people has been fuelled further by this model. In addition, it ignores indigenous peoples' own governance, economic, social, education, cultural, spiritual and knowledge systems and the natural resources that have sustained them through the generations.

11. Today, indigenous peoples continue to be enmeshed in the expansion of this model of economic development, through globalization, which enabled the market forces to influence economic and development policies at the national level. It is not surprising, therefore, to witness the strong resistance of indigenous peoples against globalization, which is viewed as an aggressive attempt to shape national economies to mimic the economic system of the industrialized countries and which is grossly unjust and has promoted further inequality and environmental devastation within a short period of time. That development model has failed to promote the cultural,

political, social, ecological and economic integrity of indigenous peoples and their communities.

12. Participants made the point that the current development paradigm is seen to be a problem rather than a solution for many indigenous peoples. Some participants questioned the usefulness of the term "development", which is a term not often used within indigenous peoples' societies. Further, such a term had not convincingly contributed to improving the lives of indigenous peoples. The participants recognized that the challenge remains for indigenous peoples to develop their own paradigms, based on the United Nations Declaration on the Rights of Indigenous Peoples. There needs to be a concept of development with culture and identity that reflects indigenous peoples' own visions, perspectives as well as strategies that respect their individual and collective rights, are self-determining, sensitive and relevant to their situation and communities.

13. Participants pointed out there have been positive developments in standard setting that can support indigenous peoples rights, which include, inter alia, the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), the United Nations Educational, Scientific and Cultural Organization Universal Declaration on Cultural Diversity (2001) and related conventions and the United Nations Declaration on the Rights of Indigenous Peoples (2007), in particular article 3, on the right to self-determination and article 32, on the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources.

14. The experts presented a number of case studies demonstrating either the enabling or the obstruction of the development processes of indigenous peoples. A good example that focused on motivating change and promoting indigenous peoples' development with culture and identity is the establishment of the Credit Union Movement in West Kalimantan, Indonesia, which is based on indigenous values of reciprocity, collectivity, solidarity, equilibrium and sustainability, among others. This initiative enhanced the collective development for indigenous peoples through the provision of loans for livelihoods, securing education, health care and the provision of pension funds, thereby promoting gender justice and increasing the participation of women, as well as increasing the safety, unity and solidarity of the members of the communities. It has also helped in protecting the rights of indigenous peoples to their lands, as the people are not forced to sell in times of dire need. The Credit Union Movement has been going on for almost 30 years and it has expanded beyond West Kalimantan to other provinces of Indonesia. At the same time, such an initiative can go wrong if the community believes more in competition and results than in cooperation and collectivity, and when money is the goal and not the tool.

15. The lessons learned from the other case studies that were presented included the use and protection of national laws which safeguard the interests of indigenous peoples in regards to their lands, territories and resources. At the same time, however, such protection measures can fall short if there are no nationally guaranteed mechanisms of fairness and where responsibility for indigenous peoples' issues is spread throughout a myriad of governmental agencies, which are often poorly coordinated. Likewise, if the collective rights of indigenous peoples are not guaranteed or recognized in law, gross abuse is likely to occur and indigenous peoples risk being marginalized even further as they are forced to sell off their

ancestral lands and exploit their natural resources in order to survive. Hence, strong collective land laws and the protection of indigenous peoples' rights at the national and local levels are crucial.

16. Defending the research practices and outcomes of indigenous peoples is a highly contested area in academia, where indigenous peoples struggle to have their traditional knowledge and world views recognized. Indigenous peoples want to have an equal footing, especially in an arena where they are still viewed as objects of research, rather than as agents for change, which creates an unequal balance of power. The main concern is for the development of new standards and protocols and the promotion of research ethics in this field.

17. The participants were also concerned with the ongoing political and economic exclusion of indigenous peoples by the extractive industries. Mineral, oil and gas extraction and deforestation that occurred and is still happening in indigenous peoples' lands have resulted in mass dislocation and the involuntary resettlement of hundreds of thousands of indigenous peoples, which has in turn damaged the social and economic fabric of communities and societies. Indigenous peoples want development with culture and identity where their rights are no longer violated, where they are not discriminated against, excluded or marginalized and where their free, prior and informed consent is obtained before projects and policies affecting them are made and equitable benefit-sharing is recognized and operationalized.

18. The participants discussed in great depth the concepts of development with culture and identity. Participants were aware of the different interpretations and expressions of development with culture and identity that exist among indigenous peoples. There is a need to compile good examples of lessons learned and good practice models as well as development models that have failed. The meeting was in no way viewed as the end of such dialogue, but rather the beginning of further exploration ahead, particularly at the ninth session of the Permanent Forum, which will focus on development with culture and identity.

## IV. Conclusions and recommendations

19. Indigenous peoples suffer the consequences of historical injustices, including colonialism, the doctrine of discovery, dispossession from their lands and resources, oppression and discrimination. Today many indigenous peoples remain impoverished and marginalized and their right to development is denied. Development paradigms of modernization and industrialization have often resulted in the destruction of indigenous governance, economic, social, education, cultural, health, spiritual and knowledge systems and natural resources.

20. Since the Second World War, the concept of development has often been conceived in strictly economic terms. The main focus has been on the quest for GDP growth and the general belief that the benefits of economic development would trickle down and also yield development in other spheres of life. The concept of development was thought to follow an evolutionary process that commenced from basic commodity suppliers, through capital accumulation to industrialization, in turn leading to urbanization and "modernization". Indigenous peoples' societies were

often regarded as "backward, primitive and uncivilized", where their "development" was understood to be their assimilation into the so-called "civilized world".[1]

21. All too often, the blind faith in self-correcting, efficient markets and the promotion of infinite consumption of finite resources, coupled with the promise that economic liberalization will lead towards rapid economic growth, results in the overexploitation of natural resources where indigenous peoples, their cultures and identities are seen as "obstacles" to progress because their lands and territories are rich in resources and indigenous peoples are not willing to freely dispose of them. Further, indigenous peoples' cultures and values are seen to be contradictory to the values of the market economy, such as the accumulation of profit, hyper-consumption and competitiveness. In many countries, the history and the continuing practice of assimilation has resulted in blanket public policies that have excluded indigenous peoples and are discriminatory in respect of their cultures and identities. The pursuit of economic growth, at all cost, is not only destructive for indigenous peoples but also for the rest of humanity and the planet. Further, the focus on GDP as a main measure of progress has distorted the true meaning of progress and well-being. The national accounting systems that mainly use GDP as a measure do not account for environmental and social costs. The damage to ecosystems, for example, that has resulted in the irreversible loss in biological diversity and the erosion of related cultural and linguistic diversity and indigenous knowledge, is not factored into the national balance sheet. Ecological, cultural, social and spiritual indicators, which will provide more comprehensive measurements of the national and global situations, are still not used.

22. The failure of the dominant development paradigm, as evidenced by the lingering global economic crisis and the environmental crisis of climate change and the erosion of biological diversity, signals the need to evolve alternative ways of thinking about and pursuing development. Indigenous peoples' visions and perspectives of development provide some of these alternatives that should be articulated and discussed further. Indigenous peoples' concept of development is based on a philosophy underpinned by the values of reciprocity, solidarity, equilibrium and collectivity, that humans should live within the limits of the natural world. Development with culture and identity is characterized by a holistic approach that seeks to build on collective rights, security and greater control and self-governance of lands, territories and resources. It builds on tradition with respect for ancestors, but also looks forward.

23. Over the decades, indigenous peoples have used the forums of the United Nations to discuss the problems they face in their own communities as a result of policies and programmes that ignore their cultural integrity, treaty relationships and rights and have negative effects on their lives and livelihoods, including mega-projects, education devoid of indigenous values and languages and the abuse of their traditional knowledge. Their concerns have also led to the development of local, regional and global indigenous movements that have focused on the protection of lands, territories and resources as well as the need to protect indigenous peoples' governance, economic, social, education, cultural, spiritual and knowledge systems and natural resources.

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[1] United Nations Development Programme, International Policy Centre for Inclusive Growth, Poverty Practice, Bureau for Development Policy, *Poverty in Focus: Indigenising Development*, No. 17 (May 2009).

24. The United Nations Declaration on the Rights of Indigenous Peoples provides a strong basis from which indigenous peoples can affirm their rights and define their aspirations in their relations with States and corporations around development with culture and identity. Article 3 is central to the Declaration as it refers to the right to self-determination. Article 32 is also a key provision that captures the essence of culture with development and identity. These articles are the result of advocacy and concerns raised by indigenous peoples at the United Nations.

25. The Declaration provides a comprehensive normative framework for advancing development with culture and identity. Key articles in that regard include the set of rights defining self-determination and full and effective participation (more than 15 articles), and the set of cultural rights proclaimed in the Declaration (more than 17 articles). Other relevant international instruments and case law include ILO Convention No. 169, as well as the case law and general comments of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights as well as decisions of the Inter-American Court of Human Rights. United Nations policy instruments have also espoused development with culture and identity, namely the United Nations Development Group Guidelines on Indigenous Peoples' Issues, adopted in 2008, and the human rights-based approach to development (see http://www.undp.org/partners/cso/indigenous.shtml). It is now time for the United Nations system to fully implement these policy instruments that support development with culture and identity for indigenous peoples.

26. Climate change has heightened the urgency to alter the dominant development model not only for the sake of indigenous peoples but for the whole of humanity and the planet. The climate change crisis is a direct result of the unabated dumping of greenhouse gases into the atmosphere caused by a fossil-fuel-based economic model and the over-exhaustion of natural resources such as forests, peat lands, grasslands, soils, and the like. Indigenous peoples disproportionately suffer from the serious impacts of climate change because they are mainly dependent on the integrity of their ecosystems for their survival and because of their impoverishment. In addition, they also suffer from climate mitigation measures that fail to respect their rights and they are the ones who mainly bear the costs of adapting to climate change. Some mitigation measures, such as emissions trading, carbon sinks, renewable energy systems, and alternative fuels, have been implemented and have resulted in the further exclusion of indigenous peoples and violations of their human rights.

27. Climate change is a proof of the failure of an economic development model that is unsustainable and, therefore, has to be changed. To meet the challenge of creating more sustainable and climate-sensitive development paths, it is important to look into the vision, concepts and practices of indigenous peoples who still sit in the territories that contain the Earth's remaining natural wealth and who are the bearers and speakers of much of what remains of the world's diverse cultures and languages. At the same time, indigenous peoples need to continue to take an active role in the negotiations on climate change and that role should not be merely in parallel processes but within the main forums where decisions are made. The issues that surround climate change are issues of equity, social justice, ecological sustainability, environmental justice and human rights.

28. The Declaration recognizes that indigenous peoples have the right to self-determination and that by virtue of that right they freely determine their

development. Indigenous peoples are thus to determine their own notions of development, as well as help to reconstruct current institutions in order to improve their situation and that of humanity as a whole. Indigenous peoples' interpretations of well-being have a number of common elements, such as:

- Importance of collective economic actors and community economic institutions
- Integrity of indigenous governance
- Purpose of production should not only be considered in terms of profit but rather in terms of improving quality of life
- Enriching the notion of development where human beings are in harmony with Mother Earth
- Self-determination
- Interaction between people, resources and the spiritual aspects of life as well as strengthening indigenous peoples' knowledge institutions.

29. There is a need to reiterate key recommendations in the report of the consultation workshop and dialogue on indigenous peoples' self-determined development or development with identity, held from 14 to 17 March 2008 in Italy, which relates to self-determined development (see E/C.19/2008/CRP.11). It contains important points, including in terms of environmental damage that should result in just compensation and remuneration. The right to self-determination of autonomous regional governments or other self-governing structures of indigenous peoples merits being further developed or enhanced. Also, there is a need to promote indigenous peoples' participation in political governance, legislative structures from the local level to the national level and beyond.

30. The development of indigenous peoples' indicators of sustainability and well-being is still a work in progress and should be continued towards the establishment of headline indicators to measure and examine the goals and aspirations of indigenous peoples and the piloting of these in several countries. These could include indicators for a harmonious society, cultural integrity, environmental sustainability and spiritual indicators viewed from the perspective of indigenous peoples. The process can lead to the creation of an index of well-being and sustainability of indigenous peoples.

31. Indigenous peoples have also defined their concept of development as a growth or process that considers indigenous identity in a holistic way that includes social, cultural, political and spiritual systems. There is a need to document and record the diversity of indigenous peoples' concepts of self-determined development. As the term "development" is not commonly used by indigenous peoples in their cultural contexts other terms and concepts used in various indigenous languages such as *sumak kawsayvivir bien*, *buenvivir*, *alli kawsay* (meaning "living well") should be made more visible.

32. Holistic concepts of development have to consider the reality and struggle that indigenous peoples experience in order to live in a market-driven society. Development policies, institutions and systems established by States must allow for diversity and plurality and the coexistence of indigenous governance, economic, social, education, cultural, spiritual and knowledge systems and natural resources

with systems adopted by the State. This is part of indigenous peoples' right to self-determination.

33. A number of case studies exist that clarify the importance of development with culture and identity for indigenous peoples and the examples presented by participants were very enlightening. Some are briefly mentioned in the section on highlights of the discussion above and also described in the papers submitted to the meeting (see http://www.un.org/esa/socdev/unpfii/en/EGM_DCI.html). The secretariat of the Permanent Forum could prepare additional compilations of good practices for development. There is also a need to compile success stories on indigenous development, which could serve as a textbook for formal and informal institutions. Further, there is a need to identify lessons learned from local experiences related to development and indigenous peoples, such as those gained by the Credit Union Movement of West Kalimantan.

34. In pursuing their well-being and sustainability, indigenous peoples should reconstitute, restore, and revitalize their cultures, priorities and perspectives. This change is in line with their rights enshrined in the Declaration and other international human rights standards.

35. Research and training on indigenous peoples' concepts of development with culture and identity, self-determined well-being and sustainability and sharing these with other stakeholders is an important requirement. Indigenous peoples' initiatives for their self-determined well-being and sustainability should be supported politically, institutionally and financially by States, the United Nations system and other intergovernmental organizations.

36. Efforts must be enhanced to operationalize and apply free, prior and informed consent. While much discussion on this issue has taken place, there is still only limited practice. The United Nations should disseminate further the concept of a free, prior and informed consent as it has been analysed by United Nations bodies, especially the Permanent Forum, as well as case studies and good practices in that regard.

37. There is a need to undertake analysis of various development concepts. Such analysis would be able to reveal what is needed and appreciated by indigenous peoples themselves. Funding institutions should finance indigenous initiatives to collect and share information on the results and experiences of this work.

38. There is a need to enhance data collection related to indigenous peoples' well-being and sustainability.

39. Education plays an important role in the establishment and progress of the proposed development with culture and identity. The establishment, accreditation and strengthening of indigenous networks and universities will facilitate the exchange of knowledge and support the conceptualization and development practices with culture and identity of indigenous peoples. Education for indigenous peoples should be culturally relevant and include support for indigenous languages. Indigenous peoples' unique pedagogy and ways of transferring knowledge should be supported. The study and advice on the right to education, issued by the Expert Mechanism on the Rights of Indigenous Peoples in 2009, provides valuable guidance in this respect.

40. Indigenous peoples have a right to determine and develop priorities and strategies pertaining to the development of their lands, territories and resources as set out in article 32 of the Declaration. Traditional knowledge is still being undermined and is disappearing and therefore needs to be supported and reinstated. Respect for indigenous peoples' traditional knowledge systems is the basis of their development with culture and identity and must be protected. Therefore, indigenous peoples' organizations should be supported to continue and expand their engagement with ongoing international processes such as the negotiations on the International Regime on Access and Benefit-sharing at the Convention on Biological Diversity and the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization.

41. Indigenous research can make an important contribution to advancing indigenous peoples' development with culture and identity. Research should be an empowering activity for indigenous peoples. Currently, research processes clearly indicate that the impact of colonization continues to be felt in the field of research. There is a need to challenge the hegemony of conventional, Western, non-indigenous research practices.

42. Indigenous peoples' interests, knowledge and experience must be at the centre of methodologies when constructing knowledge about indigenous peoples. The development of indigenous research practices will strengthen indigenous peoples' identity and in turn will support indigenous peoples' efforts to ensure self-determination in legal, political, economic and intellectual spheres. It is recommended that indigenous peoples support the current codes of conduct which already exist in universities and provide guidance to researchers in order to avoid the misuse and distortion of indigenous peoples' knowledge. Building on these efforts, a code of conduct could be presented to, and adopted by, the Permanent Forum and disseminated widely.

43. Development with culture and identity can be further strengthened through genuine collaboration among indigenous peoples, academics, States, United Nations bodies and NGOs. When pursued correctly, collaboration can be beneficial not only for empowering indigenous peoples and their cultures but also for enriching and having a positive impact on the broader society and environment.

44. The use of language is crucial in development with culture and identity, as language is not only a means of communication but also a documentation system. Each word carries cultural messages and richness of meanings. The richness of terminology in indigenous languages must also be protected in development processes because it is central to indigenous peoples' culture and identity.

45. It is recommended that indigenous peoples and industrial companies prepare studies on good practice models of development where there has been cooperation between indigenous peoples and industrial companies. Examples of such cooperation include cooperation between Udege peoples and the Terneiles Company as well as the Nenets peoples and the Novatek Company in the Russian Federation.

46. As part of development with culture and identity processes, indigenous peoples have consistently expressed a crucial need to address human rights issues related to the extractive industries. This issue has also been taken up within the United Nations, where Permanent Forum members have undertaken studies on

indigenous peoples and corporations (see E/C.19/2009/CRP.8, E/C.19/2009/CRP.11, E/C.19/2009/CRP.14, E/C.19/2010/CRP.1 and E/C.19/2010/9). In addition, an expert workshop on extractive industries was held in Manila in 2009. In 2007, the International Workshop on Perspectives of Relationships between Indigenous Peoples and Industrial Companies, was held in Salekhard, Russian Federation (see E/C.19/2008/5/Add.6). The Office of the High Commissioner for Human Rights also organized workshops on the topic of indigenous peoples and natural resource companies in 2001 and again in 2008. New tools are emerging for protecting human rights relevant to development with culture and identity, such as the new Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 63/117, annex) that provides a complaint mechanism for victims of violations of the Covenant. This is a tool that can be used by indigenous peoples.

47. Terms such as "coexistence" or "harmonious habitation" suggest a constructive relationship between all actors, including indigenous peoples, in the development processes. However, there are conditions that must be present in order for corporations and indigenous communities to coexist in a manner which reflects development with culture and identity. One of the conditions is constructive dialogue at all levels of government, taking into account all elements of human rights, among the central governments, indigenous/tribal governments and corporations. Dialogue needs to be built on a common understanding of the meaning of individual and collective human rights. Another condition is the exercise of self-determination by indigenous peoples and their communities.

48. It is also recommended that Governments and United Nations bodies ensure that capacity-building initiatives are built into all development projects and programmes which affect the rights and interests of indigenous peoples.

49. The Permanent Forum should facilitate the establishment of a mechanism of coordination between indigenous peoples, their organizations, Governments and corporations to provide genuine dialogue and technical assistance in the implementation of free, prior and informed consent, in line with international standards.

50. In the process of revising laws, policies and structures on extractive industries and other corporations, there is a need to ensure consistency with the Declaration and other international instruments in protecting the rights of indigenous peoples, and governments should ensure that the legislation governing the granting of concessions to extractive industries includes provisions on free, prior and informed consent, in line with international standards.

51. It is important that indigenous peoples contribute to the work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. At present, the Special Representative's work is concentrated on developing a conceptual and policy framework to advance the business and human rights agenda. The framework rests on three pillars: the duty of the State to protect against human rights abuses by third parties, including businesses through appropriate policies, regulation and adjudication, which is grounded in international human rights law; corporate responsibility to respect human rights which means to act with due diligence to avoid infringing on the rights of others; greater access for victims to effective

remedy, both judicial and non-judicial (see http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative).

52. It is recommended that the International Council on Mining and Metals provide a list of 10 projects that they recommend as best practices. This list should be accompanied by an open invitation for members of the Permanent Forum to visit, have access to project sites and files (see E/C.19/2009/CRP.8).

53. It is recommended that indigenous peoples advocate for the secretariat of the Extractive Industries Transparency Initiative in Norway to coordinate an effective strategy to ensure that environmental and social impact on indigenous communities are considered part of the "transparency" protocols that are to be prepared by governments that are certified under this initiative (ibid.). Further, it is recommended that national Governments evaluate the activities of their companies abroad to guarantee respect for indigenous peoples' rights.

54. It is important for indigenous peoples to make use of the next round of national and other surveys and censuses, so that the principle of self-identification is reflected in them and that disaggregated data pertaining to development and indigenous peoples can be obtained.

55. All three United Nations mandates devoted to indigenous peoples, the Permanent Forum, the Special Rapporteur and the Expert Mechanism on the Rights of Indigenous Peoples, should take account of the results of the expert group meeting and incorporate them in their work and ensure that their activities in this area are pursued in a complimentary fashion.

56. United Nations entities, academia, media and indigenous peoples should create collaborative research evaluation and monitoring processes and projects, at the local, national and global levels, to influence thinking and decision-making in the key areas related to development, including capacity-building, planning, monitoring and evaluation.

57. The United Nations Development Programme is encouraged to take into account the recommendations resulting from the meeting in its 2010 *Human Development Report* as well as reflect on the practical lessons learned. Should there be a process towards expanding the Human Development Index, the experts recommend that the idea of developing an indigenous peoples' development index and an indigenous peoples' empowerment measure along the same lines of the Gender Development Index and the Gender Empowerment Measure be considered.

58. In the run-up to the high-level United Nations meeting (September 2010) that will review progress on the regional and global processes of the Millennium Development Goals, indigenous peoples should take part in the national consultation processes, ensuring that their concerns are fed into the review process, as well as in the meeting itself. Further, the report of the meeting and the report of the Permanent Forum at its ninth session should be made available during the consultation process.

59. There is a need to take advantage of the launch of the United Nations publication *State of the World's Indigenous Peoples*,[2] and to link it with the issue of self-determined development. It is also recommended that efforts be made to

[2] United Nations publication, Sales No. E.09.IV.13.

translate this publication into all the official languages of the United Nations and that it be disseminated widely.

60. Capacity-building among indigenous peoples, from grass-roots organizations to researchers and parliamentarians, should be developed further, particularly in the African region. This will help to ensure that indigenous peoples themselves are in a position to produce information and advance their thinking and approaches to development.

# Annex I

## Programme of work

| *Date/time* | *Item programme* | |
|---|---|---|
| **Tuesday, 12 January** | | |
| 10-10.30 a.m. | | Opening of the workshop by the Department of Economic and Social Affairs |
| | Item 1 | Election of Chair and Rapporteur |
| | Item 2 | Adoption of agenda and organization of work |
| 10.30 a.m.-1 p.m. | | **Theme 1: Outline various development concepts and practices**<br><br>Analysis of international standards and recommendations that could be applied to indigenous peoples' concept of development with culture and identity (e.g. United Nations Declaration on the Rights of Indigenous Peoples, case law and comments of the Human Rights Committee and other human rights treaty bodies, Human Rights Council, United Nations Permanent Forum on Indigenous Issues, ILO and others);<br><br>Analysis of how the goals and needs of indigenous peoples may differ from the needs and goals of other interested holders in the development processes.<br><br>*Opening presentations*<br><br>Victoria Tauli-Corpuz<br>Rochelle Roco-Hachem, UNESCO |
| 3-6 p.m. | | **Theme 2: Case studies on the positive and negative effects of development on indigenous peoples and their communities**<br><br>Provide case studies where development projects have had a negative effect on indigenous peoples and their communities by generating further poverty and severe inequality and other social problems. Highlight any lessons learned from such experiences;<br><br>Provide case studies of instances where indigenous peoples are working as a community or in partnerships with Governments, United Nations agencies, the private sector, donor agencies on alternative development practices that may have positive outcomes. |

| *Date/time* | *Item/programme* |
|---|---|
| | *Presentations* |
| | Anna Naikanchina, Expert (Eastern Europe, Russian Federation, Central Asia and Transcaucasia)<br>John Bamba, Expert (Asia)<br>Kanyinke Sena (Africa) |
| **Wednesday, 13 January** | |
| 10 a.m.-1 p.m. | **Theme 3: Factors that enable or obstruct indigenous peoples' participation in development processes** |
| | Provide examples where there might be effective participation in decision-making at the national level; |
| | Highlight capacity-building efforts that provide the necessary conditions for development activities; |
| | Highlight measures of accountability and integrity in decision-making and implementation of policies at the international and national levels in regards to the development processes; |
| | Identify obstacles, including lack of relevant statistics, lack of information and lack of technical support in the development processes; |
| | Highlight the persistent barriers that block indigenous peoples' effective participation in the development process; |
| | Analyse the role of the donor community and the private sector in enhancing or weakening indigenous peoples' participation in the development process. |
| | *Presentations* |
| | Jelena Poranger, Expert (Arctic)<br>Jeanette C. Armstrong, Expert (North America) |
| 3-6 p.m. | **Theme 4: Human rights and corporate responsibility in development programmes and projects** |
| | Highlight measures to incorporate human rights into programmes and projects of corporations; |
| | Highlight measures to strengthen corporate responsibility in development programmes and projects and how they might benefit indigenous peoples' concept of development with culture and identity; |

| *Date/time* | *Item/programme* | |
|---|---|---|
| | | Highlight measures for States to provide effective mechanisms for just and fair redress for adverse environmental, economic, social, cultural or spiritual impact by development projects and programmes on indigenous peoples' lands, territories and resources. |
| | | *Presentations* |
| | | Myrna Cunningham (Latin America and the Caribbean)<br>Rachel Davis, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises |
| **Thursday, 14 January** | | |
| 10 a.m.-1 p.m. | Item 7 | Strategies to identify gaps and challenges and a possible way forward |
| 3-6 p.m. | Item 8 | Adoption of conclusions and recommendations |

# Annex II

## List of participants

**Invited experts**

Kanyinke Sena (Africa)

Jelena Poranger (Arctic)

Myrna Cunningham (Central, South America and the Caribbean)

Anna Naikanchina (Eastern Europe, Russian Federation, Central Asia and Transcaucasia)

John Bamba (Asia)

Jeannette C. Armstrong (North America)

**Members of the Permanent Forum**

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**Discussion on the special theme for the year: "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples"**

**Future Work of the Permanent Forum, including issues of the Economic and Social Council and emerging issues**

# Study on the impact of climate change adaptation and mitigation measures on reindeer herding

## Submitted by the Special Rapporteur

*Summary*

At its eighth session, in May 2009, the Permanent Forum appointed Lars-Anders Baer, member of the Permanent Forum, as Special Rapporteur to prepare a study on the impact of climate change adaptation and mitigation measures on reindeer herding and requested that the report be submitted to the Permanent Forum at its ninth session, in April 2010.

The present report is a synthesis of a more extended paper.

* E/C.19/2010/1.

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# I. Introduction

1. At its eighth session, held from 18 to 29 May 2009, the Permanent Forum on Indigenous Issues convened a half-day discussion on the Arctic. Based on the discussion, the Permanent Forum adopted several recommendations (see E/2009/43) on the Arctic and climate change. Climate change has an impact on all aspects of life in the Arctic region, from traditional subsistence activities, including hunting, fishing, reindeer husbandry, farming, gathering and food sovereignty, to community health. It has also been emphasized that climate change and environmental degradation related to natural resource extraction, such as mining and forestry, already constitute great threats to the traditional lifestyles and cultures of indigenous peoples of the Arctic.

2. Discussions held at Permanent Forum sessions and in the various Convention on Biological Diversity frameworks, as well as with United Nations agencies, such as the International Fund for Agriculture Development (IFAD),[1] the Food and Agriculture Organization of the United Nations (FAO),[2] the United Nations Development Programme (UNDP),[3] the United Nations Environment Programme (UNEP)[4] and the United Nations Education, Scientific and Cultural Organization (UNESCO)[5] have recently considered some of the challenges faced by pastoralists, in an effort to improve working relations with different communities of pastoralists, mainly in Africa and Asia.

# II. International framework

3. Animal herding (pastoralism) is a subsistence strategy that is practised by peoples and populations of low-producing ecosystems worldwide. It has been estimated that pastoralism is practised on 25 per cent of the global land area, providing 10 per cent of the world's meat production. In the Arctic, reindeer is the primary livestock production. It is slowly vanishing due to land pressure, ecological degradation and climate change, particularly in the developing countries. Due to dynamic developments in international law regarding indigenous peoples in the recent decade, specific challenges and problems faced by the indigenous pastoralists have been partly addressed in national, regional and international standard settings.

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[1] International Fund for Agricultural Development, *Engagement with Indigenous Peoples*. Available from www.ifad.org/operations/policy/policydocs.htm. Accessed on 20 January 2010.

[2] Food and Agriculture Organization of the United Nations, "Pastoralism in the new millennium". Available from www.fao.org/docrep/005/Y2647E/y2647e13.htm. Accessed on 20 January 2010.

[3] United Nations Development Group, *United Nations Development Group Guidelines on Indigenous Peoples Issues*. Available from www.undp.org/partners/civil_society/publications/UNDG. Accessed on 20 January 2010.

[4] United Nations Environment Programme and European Environment Agency, *Arctic Environment: European Perspective: Why Should Europe Care?* Environmental issue report No. 38 (Copenhagen, European Environment Agency, 2004).

[5] Joji Carino, "Poverty and Well-being", in *State of the World's Indigenous Peoples* (United Nations publication, Sales No. 09.VI.13).

## A. United Nations Declaration on the Rights of Indigenous Peoples

4. The Declaration includes several articles of relevance to the rights of indigenous pastoralists to natural resources. The Declaration also expresses more specific rules on rights to natural resources. Art. 26 (2) establishes the right of indigenous peoples to own, use, develop and control "lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use". For indigenous peoples, many of whom are pastoralists, article 36 has special relevance:

> 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
>
> 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

## B. Article 27, International Covenant on Civil and Political Rights

5. Article 27 is the core clause in the International Covenant on Civil and Political Rights concerning minorities and reads as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

6. The Covenant has repeatedly been interpreted such that, especially in the case of indigenous peoples, "culture" covers traditional or otherwise typical means of subsistence that are based on the land and its resources. If this concept is understood to include the material, namely, economic and physical, bases of the culture of an ethnic minority, then the provision will encompass the use of resources and rights to land and water, such as reindeer herding.[6] For many indigenous pastoralists it is indeed the material basis of the culture concerned.

7. Article 27[7] promotes the rights of individuals, at the same time taking into account the collective dimension of these rights (in community with the other members of their group). Article 1 of the Covenant on peoples' right to

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[6] See for example *Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada*, Report of the Human Rights Committee, A/45/40, vol. II; *Kitok vs. Sweden*, A/43/40; and *I. Länsman et al vs. Finland* (Communication No. 511/1992), CCPR/C/52/511/1992; General Comment No. 23 (article 27), adopted by the Human Rights Committee at its 1314th meeting (fifteenth session); and concluding observations of the Human Rights Committee: Australia 28/07/2000, CCPR/CO/69/AUS. (Concluding Observations/Comments), paras. 10 and 11. See Inter-American Commission on Human Rights, Report on the situation of the Nicaraguan population of Miskito origin, OEA/Ser. L/V/II.62, doc. 10 rev. 3, at 76-78, 81 (1983).

[7] See Mattias Åhrén, Martin Scheinin, John B. Henriksen, The Nordic Saami convention: international human rights, self-determination and other central provisions, *Journal of Indigenous Peoples Rights*, No. 3/2007.

self-determination,[8] in turn, states that the right is a purely collective one, which, according to the interpretation of the Human Rights Committee, cannot as such be an object of an individual's complaint, although it can affect the interpretation of decisions made by the Committee on the complaints of individuals based on the rights safeguarded by the Covenant.

8. As an example, the Human Rights Committee has expressed its concern about de facto discrimination against the Saami in Sweden in legal disputes, since the burden of proof for land ownership has been placed wholly on Saami claimants. The Committee also notes that, although legal aid may be granted to individuals who are parties in civil disputes, no such possibility exists for Saami villages, which are the only legal entities empowered to act as litigants in land disputes in respect of Saami lands and grazing rights (articles 1, 2, 14, 26 and 27 of the Covenant). It recommended in this context:

> The State party should grant adequate legal aid to Saami villages in court disputes concerning land and grazing rights and introduce legislation providing for a flexible burden of proof in cases regarding Saami land and grazing rights, especially where other parties possess relevant information. The State party is also encouraged to consider other means of settling land disputes, such as mediation.[9]

9. In Norway, the Saami reindeer herding communities also faced the same problem, but in the 1990s the Norwegian Parliament made an adjustment in the reindeer herding legislation and balanced the burden of proof concerning reindeer grazing disputes and between landowners and the reindeer herding communities. Moreover, the Government of Norway has also guaranteed legal aid to the reindeer herding communities in the event of disputes in court.

## C. Jurisprudence: *Taxed Lapp Mountain* case

10. In Sweden, the Supreme Court Case NJA 1981 s[10] acknowledged that Saami traditional land use, namely, fishing, hunting and reindeer herding, could give rise to legal title, which was confirmed by the Swedish Supreme Court in the *Taxed Lapp Mountain* case. The Saami villages (Samebyar) in the southern part of the traditional Saami territory on the Swedish side claimed ownership right to their traditional land. In the case, the Swedish crown made the claim that the traditional Saami territory was "terra nullius". The *Taxed Lapp Mountain* case is comparable to the *Mabo* case in Australia. Even though the Supreme Court found in favour of the Swedish Government, it made some important remarks in support of the Saami cause. First, the Supreme Court stated that the Saami people's right to pursue reindeer husbandry on its traditional land was a usufruct right not depending on legislation, which the Government had claimed. Secondly, the Supreme Court noted

[8] See John B. Henriksen, "Sámi self-determination: scope and implementation". *Journal of Indigenous Peoples Rights*, No. 2/2008.

[9] The Committee considered the sixth periodic report of Sweden (CCPR/C/SWE/6) at its 2612th and 2613th meetings (CCPR/C/SR.2612 and 2613), held on 25 March 2009, and adopted this concluding observation, among others, at its 2625th meeting (CCPR/C/SR.2625), held on 2 April 2009.

[10] See NJA 1981 s 1.

that it was likely that the Saami people had ownership rights to other parts of its traditional land, in particular further north in traditional Saami territory.[11]

## D. International Labour Organization Convention No. 169

11. International Labour Organization (ILO) Convention No. 169 concerning indigenous and tribal peoples in independent countries includes several provisions relevant to indigenous pastoral people's rights. Article 32 has a special relevance for many pastoralists in Africa and Northern Europe:

> Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and cooperation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

12. Among the 20 countries that have ratified ILO Convention No. 169, only two countries have pastoralist communities, namely, Nepal and Norway. In Norway, the reindeer legislation has been adjusted concerning adequate legal aid to reindeer herders in court disputes and introduces legislation providing for a flexible burden of proof in cases regarding Saami land and grazing rights.

## E. Regional framework

13. The European Convention on Human Rights focuses on the protection of private and family life. Article 8 of the Convention also provides a legal basis for claims that arise from the present conditions of indigenous peoples and concerns the safeguarding of a distinct way of life and its material basis. One case against Sweden concerning Saami rights was declared admissible in 2009 before the European Court of Human Rights (*Handölsdalen Saami village and Others vs. Sweden*, application No.: 39013/04), following the findings of the Swedish courts that five Saami villages in Härjedalen in northern Sweden had no existing right to reindeer grazing on properties belonging to 571 private landowners. The applicants claimed that their right to winter grazing — constituting a possession within the meaning of article 1 of Protocol 1 of the Convention — had been violated.

[11] Another unique judicial case in Sweden concerns the transfer of Saami traditional land to a Government-owned energy company. The company applied to be registered as the owner of three separate land areas within traditional Saami territory. In all three cases, the Saami parties concerned challenged the application, arguing that the company could not be registered as the owner since it had not been sufficiently demonstrated that the land belonged to the State in the first place. In June 2000, a Swedish Court of Appeals held that the energy company could be registered as the owner, more or less indirectly arguing that it would not be reasonable for Sweden's largest water dam to be situated on Saami traditional land. A comparison can be made with a recent ruling in the part of Saami territory that is today Norway. In the so-called *Svartskog* case in 2001, the Norwegian Supreme Court tried to determine the rightful owners of the Manndalen valley in Nord-Troms County: the local Saami community or the State. The Supreme Court found in favour of the Saami parties, holding that the Saami community had acquired ownership to the land through collective utilization since time immemorial.

14. The Russian State Duma approved Protocol 14 to the European Convention on Human Rights on 15 January 2010.[12] This is a significant decision by the State Duma and will be of importance for the whole of Europe. The Protocol will help the European Court of Human Rights to deal with its backlog of cases and to reinforce its vital role in defending the human rights of individual citizens throughout Europe. The approval of the ratification is a part of the modernization of the Russian judicial system and will also address the rights of indigenous peoples in general, including pastoral indigenous peoples.

15. The Framework Convention for the Protection of National Minorities also addresses matters related to indigenous peoples as minorities. A recent example concerns the issue[13] of disputes over land rights in the Saami homeland in Finland, which have become increasingly acute owing to persistent delays in finding solutions to the open issues despite recent efforts to introduce pertinent legislation.

16. The accession agreement governing the entry of Finland and Sweden into the European Union in 1995 contains Protocol No. 3.[14] For Sweden, Protocol No. 3 was necessary to preserve reindeer husbandry as a sole right of the Saami. For Finland, Protocol No. 3 was not a necessity. The fact that Finland still became a party to Protocol No. 3 could therefore be viewed as a sign of Finland's intention to render reindeer husbandry a sole right of the Saami sometime in the future. Protocol No. 3 grants Finland and Sweden an exception from the European Union (EU) competition rules for the purposes of protecting Saami reindeer husbandry.

17. Arctic indigenous peoples in EU are protected by special provisions under European Community Law.[14] A key principle of the joint statement on EU development policy[15] is the full participation and free, informed consent of indigenous peoples. EU regional policy and cross-border programmes also benefit indigenous peoples, whose organizations participate in the Northern Dimension policy. The rights of indigenous peoples are a thematic priority under the European Initiative for Democracy and Human Rights. In the EU Arctic policy, climate change is a focus, and this was communicated to relevant EU bodies on 11 November 2008.[16] EU committees engage with Arctic indigenous peoples in a regular dialogue and support in particular the organizations and activities of the Saami and of other peoples of the European Arctic, inter alia, under regional and cross-border programmes, and promote Northern European know-how in reindeer husbandry.

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[12] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. Available from www.coe.int/NewsSearch/Default.asp?p=nwz&id=12714&lmLangue=1. Accessed on 20 January 2010.

[13] Resolution CM/ResCMN(2007)1 on the implementation of the Framework Convention for the Protection of National Minorities by Finland (Adopted by the Committee of Ministers on 31 January 2007, at the 985th meeting of the Ministers' Deputies).

[14] Act concerning the Conditions of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, as amended. Protocol No. 3 on the Saami People.

[15] Adopted by the European Council, the European Parliament and the Commission on European Development Policy.

[16] "The European Union and the Arctic region". Communication from the European Commission to the European Parliament and the European Council in Brussels on 20 November 2008.

## III. Reindeer pastoralism: subsistence strategy[17]

18. Reindeer pastoralism, ancient in origin in all its forms, represents models in the sustainable exploitation and management of northern terrestrial ecosystems that are based on generations of experience accumulated, conserved, developed and adapted to the climatic and political/economic systems of the North. Reindeers have major cultural and economic significance for indigenous peoples of the North. The human ecological systems in the North, like reindeer pastoralism, are sensitive to climate change, perhaps more than in virtually any other region of the globe, owing in part to the variability of the Arctic climate and the characteristic ways of life of indigenous Arctic peoples. Understanding and measuring vulnerability requires assessment of the ability of systems to adapt to impact and the extent to which the freedom to adapt is constrained.

19. Circumpolar reindeer husbandry has a long history in the North. Reindeer husbandry is practised in Norway, Sweden, Finland, the Russian Federation, Mongolia, China, Alaska, Canada and Greenland. It involves some 100,000 herders and 2.5 million semi-domesticated reindeers. There are over 20 indigenous peoples involved in reindeer husbandry today. World reindeer herders, owing to their experience, traditional knowledge and skills, have developed unique management strategies, including for the protection of pastures and for the observation of changes in and the rational use of natural resources, which should be recognized and supported.

20. Archaeological remains and cave paintings in France and Spain from the end of the Pleistocene, 11,000 to 17,000 years ago, have led some to call that period the "Age of the reindeer". Today in the Arctic, the "Age of the reindeer (*Rangifer tarandus*) continues. There are as many as 3 million wild and 2 million domesticated reindeer around the North, and for many indigenous peoples, reindeer are their cultural, economic, social and spiritual foundation.

21. The domestication of wild reindeer is a process that defies easy explanation. Certainly, people followed migrating reindeer as the ice retreated northward and used decoys to hunt them. Some archaeological evidence (cave paintings) seems to suggest that domestication emerged from the Sayan mountains between the Russian Federation and Mongolia, perhaps 2,000 to 3,000 years ago. Another theory holds that Tungus (the ancestors of today's Evenki and Eveny) domesticated reindeer independently in the east of Lake Baikal, and that instead of a single site origin, reindeer husbandry originated in multiple sites simultaneously. New evidence is continually backdating this relationship. Reindeer peoples have their own stories and theories about domestication and the relationship between wild and domestic reindeer.

22. The 1600s were said to mark a transformation of indigenous reindeer economies as competing nation States began a process of colonizing indigenous peoples, encroaching on their lands and utilizing their resources. For some, this represented an opportunity — and herds grew to feed growing markets. Russian expansion into the vastness of Siberia in search of fur was enabled by reindeer — for both food and transportation. The late nineteenth and early twentieth centuries

[17] Based on Anders Oskal, Johan Mathis Turi, Svein D. Mathisen and Philip Burgess, eds., *Ealát, Reindeer Herders' Voice: Reindeer Herding, Traditional Knowledge and Adaptation to Climate Change and Loss of Grazing Lands* (2009).

saw the expansion of reindeer husbandry into North America as attempts were made to graft Saami reindeer husbandry onto the Inupiat and Yupik peoples of the Seward peninsula, Alaska and later the McKenzie Delta in northern Canada. In the 1950s, a similar venture was attempted in Greenland. Although of mixed success, these experiments have persisted to this day.

## IV. Overview of reindeer herding peoples[17]

23. Today, we can broadly differentiate between tundra and taiga reindeer husbandry. "Tundra" refers to long migrations in the summer to coastal or mountain areas in order to flee insects and to access better pastures. Winter marks a return inland to shelter, a more stable climate and a change in diet. Herds tend to be large, up to several thousand reindeer, and migration routes are long, often hundreds of kilometres. Meat production is mainly practised by the Saami, Nenets, Komi, Eveny, Chukchi and Koryak. Taiga reindeer husbandry, practised by the Chuvans, Evenki, Eveny, Khets, Khanty, Mansi, Enets, Dolgans, Negidals, Tofalars, Soyots, Tozha-Tuvans, Dukhas/Tsataans, Uil'ta and Yukagir, is geographically widespread, is characterized by smaller herds, by the animals being ridden and by much shorter migration routes in forested or mountainous areas. Animals are primarily used for transportation and milk production. In tundra and taiga reindeer husbandry, reindeer provide food, clothing, shelter and transportation. The production of handicrafts is increasingly important for reindeer peoples and there is a relatively new market for soft antlers (for pantocrine) in the Far East.

### A. Russian Federation

24. About two thirds of the world's reindeer husbandry can be found within the Russian Federation today, and it is the only nation that has all the different ethnic groups of indigenous reindeer herders within its borders. Reindeer herding is practised in 20 regions of the Russian Federation. The main reindeer herding regions include Yamal, Nenets, Sakha (Yakutia) and Chukotka. In the Russian Federation, tundra reindeer herding is dominating in size. The Nenets peoples form the largest indigenous group of the Russian North and are one of the world's great reindeer herding peoples who have come to personify large-scale tundra reindeer husbandry. The bulk of Nenets reindeer husbandry is situated on the Yamal peninsula, which is the world's largest area of reindeer husbandry.

25. Reindeer are central to the social, cultural, spiritual and economic life of the reindeer herding peoples in the Russian Federation. Reindeer are used for meat production, traditional handicraft production, transportation and milking. Today, herds could comprise both collectively and privately owned animals, although this varies greatly from region to region. In Yamal, for instance, there has been an increasing trend in the share of privately owned reindeer during recent decades, while the opposite situation exists in Chukotka. Reindeer husbandry is typically administered by enterprises that date back to Soviet times, although family-based units are central to the internal organization of the livelihood. The number of people choosing reindeer husbandry as a livelihood is variable from region to region, as is private reindeer ownership within the collective herds.

26. Many of the reindeer herding peoples in the taiga region face serious challenge. For example, the Soyot of the Buryat Republic used reindeer for riding, transportation and hunting, like other peoples in the taiga zone. The 1930s, however, were a very challenging time for the Soyot. They were lumped together as a people with the Buryat, and their reindeer were collectivized. In the 1960s, reindeer husbandry was claimed to be unprofitable and was disbanded, and the Soyot lost all their reindeer. Currently, there would appear to be approximately 20 people left practising traditional reindeer husbandry, with perhaps 30 to 50 reindeer. As with the Tofalar and other peoples in taiga reindeer husbandry, it seems likely that the Soyot will completely lose their connection with reindeer, unless there is a sustained programme of support.

## B. Mongolia

27. The Dukha/Tsataan are a nomadic peoples whose traditional migration patterns have been disrupted by border closures in the 1920s and who are present-day Mongolia's only reindeer herders. Currently, just over 200 Tsataan[18] live in the Mongolian taiga and their family-based herding system comprises herds of between 7 and 160 reindeer. The number of reindeer has been in flux over the past two decades and has fallen from over 2,000 in the late 1970s to approximately 700 in 2006. Reindeer are used for milk production, transportation and, more recently, their antlers are used for handicrafts. Meat production is not a significant part of Tsataan reindeer husbandry. The Tsataan move with their reindeer in the eastern Sayan mountains, which mark the border between Mongolia and Siberia, over an area of some 20,000 square kilometres at elevations of between 1,850 and 2,100 metres. The Tsataan people mark the southerly boundary of indigenous reindeer husbandry, and their animals are adapted to high (40°C) summer temperatures.

## C. China

28. Evenki reindeer husbandry in China is limited to a small region in the north-eastern area of the country, between 50° and 53° north. There are currently 234 Evenki engaged in reindeer husbandry, among 20 families who herd approximately 1,000 reindeer. The reindeer herding Evenki are the surviving members of what had been a larger Evenki population of hunters who had moved freely across the Russian-Chinese border. After the Russian-Chinese border conflict in the 1960s, the migration over the borders was closed and the reindeer were collectivized in 1967. Their herding is consistent with other south-Siberian reindeer herding peoples: small numbers of clan-owned reindeer are milked and they are also used for transport. Soft antler production for the Asian pharmaceuticals market is the main cash crop, and efforts are under way to develop small-scale tourist activities in the clans closest to the largest city of the region, Genhe.[19]

[18] Sustainable reindeer husbandry project of the Sustainable Development Working Group, Arctic Council, Norway. See www.reindeer-husbandry.uit.no.

[19] The Association of World Reindeer Herders 5th Congress will be held in Genhe in 2013.

## D. Alaska, the United States of America, the Northwest Territories, Canada and Greenland

29. Reindeer husbandry in Alaska has its roots in the purchase of 1,280 reindeer from the Russian Chukchi region as part of a plan of the Government of the United States of America to provide a source of economic development and meat for the indigenous inhabitants, the Inupiaq. In 1894, Saami herders were brought to the Seward peninsula, which brought increased commercialization and a large increase in numbers (over 600,000 by 1932). The depression, protectionism in the lower 48 States, confusion over ownership, predation and loss of reindeer and caribou saw a sharp decline in the ensuing decades. Saami involvement ended in this period. Currently, there are approximately 10,000 reindeer managed by 21 herders who are members of the Kawerak Reindeer Herders Association and who practice an extensive management style of herding.

30. The Government of Canada initiated the Reindeer Project in the 1920s, and by the mid-1930s, reindeer had been brought from Alaska to the Mackenzie Delta. Saami families from Norway were brought in to provide training on herding practices and to this day, Inuvialuit and Saami descendents of the Reindeer Project herd approximately 2,000 to 3,000 reindeer near Inuvik, locally owned and managed by the Kunnek Resource Development Corporation. In the 1950s, a similar venture was attempted in Greenland and small-scale reindeer herding continues to be practised in southern Greenland.

## E. Finland, Norway, Sweden and the Russian Federation (Kola peninsula)

31. The traditional areas of Saami reindeer husbandry were divided between the borders of four nation States: Norway, Sweden, Finland and Russia (Kola peninsula) in the seventeenth, eighteenth and nineteenth centuries, the effect of which was to create a major disruption in traditional herding practices. Reindeer herding is still partly a cross-border activity,[20] especially in the border area between Sweden and Norway, which is based on the border treaty of 1751. An addendum to the border treaty, known as *Lappkodicillen*, proclaimed that the Saami should continue to be allowed to use the grazing areas on each side of the borders that they had customarily utilized.[21] In Finland, Norway and Sweden the reindeer herding framework is founded on customary law and reindeer herding legislation. Approximately 6,500 Saami work as reindeer herders in the Saami area. Reindeer husbandry in the Saami region is characterized by larger herds and a relatively high degree of mechanization in all regions. Reindeer are primarily used for meat production, though hides, bones and antlers are an important source of material for clothing and handicrafts. All animals in the Saami area, excluding the Russian

[20] These migrations over the border have since 1751 been regulated in different so-called reindeer grazing conventions (renbeteskonventioner) between Norway and Sweden. The most recent convention was negotiated in 1972 and was in force until 2005. Sweden and Norway are negotiating a new convention.

[21] *Lappkodicillen* proclaimed several other rights of the Saami people, declared that the States should respect the Saami people's customary laws, and referred to the Saami as a Saami nation. *Lappkodicillen* is thus a very important document to the Saami. It is sometimes referred to as the Magna Carta of the Saami.

Federation, are privately owned, although many aspects of herding are practised collectively.

32. Only the Saami may herd reindeer in Norway and Sweden, in traditional Saami territory. Reindeer herding is also practised in southern Norway and the Torne valley, which marks the border between Sweden and Finland in special "concession areas", where Norwegians and Swedes can also herd reindeer. In Finland, reindeer husbandry is not ethnically restricted to the Saami, and the livelihood is open to any individual from a member country of the European Union. On the Russian side, reindeer husbandry is practised primarily by the Komi people. Saami make up the rest, with some Russians and Ukrainians also herding. The reindeer husbandry area covers 40 per cent of the entire surface area of Finland, Norway and Sweden, and the number of reindeer is over 700,000.

# V. Initiatives

## A. Association of World Reindeer Herders

33. Since the establishment of the Association of World Reindeer Herders in 1997, questions related to the loss of grazing land and climate change have been matters of priority on the Association's agenda. On the occasion of the adoption of the Kautokeino Declaration[22] by the 4th World Reindeer Herders' Congress, held in Kautokeino, Norway, from 30 March to 3 April 2009, the world's reindeer herders shared the concerns of the Standing Committee of Parliamentarians of the Arctic Region that climate change was a matter of urgency, that it already had a strong impact on the living conditions of Arctic indigenous peoples, that there might be an explosion in human activity in the Arctic as a result of climate change and that there was a need to find ways to regulate that activity and to keep ahead of the development. This had also been expressed by the Chair of the Standing Committee of Parliamentarians of the Arctic Region, Hill-Marta Solberg, in her speech at the 5th Arctic Council Ministerial Meeting, held in Salekhard, Russian Federation, on 26 October 2006.[23] Moreover, the Kautokeino Declaration also expressed the concern that the situation regarding the loss of grazing land had become worse since the 3rd World Reindeer Herders' Congress, held in Yakutsk, Russian Federation, in 2005, and supported the establishment of an international committee to investigate reindeer herders' loss of grazing land and to develop a mechanism to involve the United Nations in the work to support sustainable reindeer husbandry. Another initiative linked to the Association of World Reindeer Herders is the UNEP project on impacts of land-use change and climate change on nomadic herders, endorsed under UNEP work on ecosystem-based adaptation. This initiative will assess the impacts of land-use change and climate change on nomadic pastoralists and their adaptation options and opportunities, focusing on taiga reindeer herding in the Russian Federation, Mongolia and China, and yak herding in the Himalayas. The project is a collaborative effort between the Association of World Reindeer Herders,

[22] Available from http://archive.arcticportal.org/530/01/Kautokeino_Declaration_2009_ENGLISH.pdf.

[23] Available from http://arctic-council.npolar.no/Meetings/Ministerial/2006/Speech_Solberg_Salekhard.pdf.

the International Centre for Reindeer Husbandry, and the UNEP Global Resources Information Database Office in Arendal (GRID-Arendal), among other entities.

## B. Arctic Council

34. In the Arctic Council framework, the major future challenges for reindeer herding and the reindeer industry have been analysed in two reports from the Arctic Council, *Sustainable Reindeer Husbandry*[24] *and Family-based Reindeer Herding and Hunting Economies, and the Status and Management of Wild Reindeer/Caribou populations* (2004). There is also an ongoing Arctic Council project entitled "EALÁT-information: reindeer herding, traditional knowledge and adaptation to climate change and loss of pastures" (see below). The 6th ministerial meeting of the Arctic Council, held in Tromsø, Norway, on 29 April 2009, acknowledged that indigenous peoples in the Arctic were taking a leading role in using the best available traditional and scientific knowledge to help to understand and adapt to challenges related to climate change and other challenges in their societies, and welcomed initiatives to build the capacity of indigenous peoples.[25]

## C. International Polar Year Reindeer Herders Vulnerability Network Study: EALÁT

35. As a follow-up to the 2005 Arctic Climate Impact Assessment,[26] the International Polar Year initiative was undertaken by EALÁT (Reindeer Herders Vulnerability Network Study), which focused on understanding the adaptive capacity of reindeer pastoralism to climate variability and change. The EALÁT study was initiated by the Association of World Reindeer Herders, and is being co-managed by a former Chairman of the Permanent Forum, Ole Henrik Magga, at Sámi University College,[27] along with Svein D. Mathiesen and Executive Director, Anders Oskal, at the International Centre for Reindeer Husbandry.[28] The coordinating institution for research in EALÁT is Sámi University College, while the information, outreach and Arctic Council components of EALÁT are operated by the International Centre for Reindeer Husbandry, in close cooperation with the Association of World Reindeer Herders. The International Centre for Reindeer Husbandry was established by the Government of Norway in 2005 to maintain and develop sustainable reindeer husbandry in the circumpolar North, to strengthen the cooperation between indigenous herding communities and peoples, to disseminate information about reindeer husbandry and to document reindeer herders' traditional knowledge. The International Centre for Reindeer Husbandry is a member of the University of the Arctic.[29] A large number of other knowledge, research and educational institutions are also involved in the project, including indigenous

[24] Johnny Leo L. Jernsletten and Konstantin Klokov, *Sustainable Reindeer Industry* (Tromsø, Norway, Centre for Saami Studies, 2002).

[25] See http://arctic-council.org/filearchive/Tromsoe%20Declaration-1.pdf. Accessed on 20 January 2010.

[26] Available from http://www.amap.no/acia. Accessed on 20 January 2010.

[27] See www.samiskhs.no. Accessed on 20 January 2010.

[28] See www.reindeercentre.org. Accessed on 20 January 2010.

[29] See www.uarctic.org. Accessed on 20 January 2010.

non-governmental organizations, such as the Saami Council and the Russian Association of Indigenous Peoples of the North (RAIPON).

## D. Case study[30]

36. A case study concerning reindeer herding and the effect of climate change was conducted in the Saami areas in Finland in the beginning of the new millennium. The case study indicated that the weather was changing and that there was rain during the winter and other extreme weather events. Weather fluctuations, in particular rain and mild weather during the winter, often prevented reindeer from accessing lichen, which was vital for their survival. In some years, this had caused a massive loss of reindeer. The study provided information about unusual rain during the winter that encapsulated the ground in ice beneath the snow, preventing animals from reaching sources of food. This had forced many Saami communities to feed the reindeer with hay and fodder, whenever the lichen became trapped under ice, as a result of winter rain. In some instances, this seriously affected the possibility to travel on the snow and ice, and the thinner ice made it more dangerous to cross rivers and lakes. There are reports that certain birds, especially ground birds, have disappeared. Many Saami used to hunt birds while herding reindeer, which is not an option any longer in many areas. Some Saami elders state that traditional weather-reading skills cannot be trusted anymore due to the effects of climate change. The Saami normally combine various natural resource-based economic activities, including reindeer herding, fishing, hunting, trapping and berry picking.

## E. Integrated climate and energy policy

37. In the past 50 years, around 25 per cent of the reindeer pastures of the Euro-Arctic Barents region have in effect been lost as a result of human development.[31] This challenge is also particularly relevant today, as the Arctic is said to hold around 25 per cent of the world's remaining undeveloped petroleum resources, large deposits of minerals and unexploited forest. After the fifteenth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change,[32] held in Copenhagen in December 2009, it is expected that efforts to mitigate climate change by increased use of renewable resources, such as windmills and hydroelectric dams, will intensify pressure on grazing lands. In the north of Sweden, a Swedish/German joint venture is planning the construction of a windmill park within the reindeer grazing lands of the Östra Kikkejaure Saami community. This is the biggest windmill park planned to date, and the Government of Sweden will soon give the go-ahead to the project. The project will have a mainly negative effect on reindeer husbandry in the concerned Saami community.

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[30] This case study comes from a project carried out as part of the Snow Change programme organized by the Environmental Engineering Department at Tampere Polytechnical in Finland.

[31] N. J. C. Tyler et. al., "Saami reindeer pastoralism under climate change: applying a generalized framework for vulnerability studies to a sub-arctic social-ecological system", *Global Environmental Change*, Vol. 17, Issue 2 (May 2007).

[32] Copenhagen Accord of 18 December 2009. Decision -/CP.15.

38. The final report from the Swedish Commission on Climate and Vulnerability[33] concludes that the conditions for reindeer herding in Sweden will be significantly affected by climate change. The report points to factors that would likely be relevant to other reindeer herding regions as well. The vegetation period will be prolonged, and plant production during summer grazing will increase. Insect harassment may be exacerbated. Areas of bare mountain are expected to decrease in extent, and pressure on coastal winter grazing may increase as snow conditions become more difficult inland and in the mountains, which may lead to more conflicts of interest with other sectors of industry. The most serious consequence will be a threat to Saami culture if conditions for reindeer herding worsen.

39. The Swedish Commission on Climate and Vulnerability points to two positive effects of climate change: plant production, when there is no snow on the ground (summer grazing), can increase by 20-40 per cent; and the growing season can be extended by about a month. The lengthening of the time with no snow on the ground and shorter winters are positive effects for reindeer. Also, snow-free grazing is more nutritious than winter grazing.

40. The Swedish Commission also foresees that forestry is probably the industry that most affects the conditions for conducting reindeer husbandry. In a future climate, the opportunities for conducting forestry will probably move northward and higher into the mountains, while forest growth will also increase throughout the reindeer herding region. This ought to promote more intensive forestry and a desire to expand forestry into areas where it is currently not possible to carry out such operations. At the same time, climate change may encourage an increased concentration of reindeer in certain areas, particularly near to the coast, during difficult grazing years. As a result, there will be an increased risk of conflicts of interest between forestry and reindeer herding.

41. The Swedish Commission also predicts a risk of conflict regarding land use between reindeer herding infrastructure, mining, wind power, space operations and military exercises. A warmer climate that favours agriculture in northern Sweden may also become a source of increased land usage conflicts.

42. There is a need to investigate how reindeer herding and conditions for the Saami will be affected by climate change. The development of further analysis on methods and modelling of grazing biotopes is required in order better to estimate future access to pasture in summer and winter. This is an example of further research that could facilitate reindeer herding in a changed climate.

43. The Swedish Commission suggests, among other measures and proposals, the following:

- The Swedish Forest Agency should be commissioned, in consultation with the Saami Parliament, to propose further measures, including changes to current regulations, to ensure that forestry shows greater consideration in the reindeer husbandry area, as well as to identify essential areas for winter grazing, where, for example, considerate land preparation should be undertaken.
- The Swedish Environmental Protection Agency, the National Board of Housing, Building and Planning, and the Saami Parliament should be

[33] *Sweden Facing Climate Change: Threats and Opportunities, Final report from the Swedish Commission on Climate and Vulnerability* (Stockholm, Edita Svesige AB, 2007).

commissioned to propose how the effects of climate change on reindeer herding can be taken into account in environmental impact assessments and strategic environmental assessments.

44. The Swedish Government bill on an integrated climate and energy policy (bill 2008/09:162), based on the Swedish Commission on Climate and Vulnerability study, was adopted by the Swedish Parliament in 2009. The Saami Parliament[34] will receive during 2010 about $4.1 million under a three-year period in order to meet the changed conditions for the reindeer industry caused by climate change. The Saami Parliament is involved in close cooperation with the EALÁT project concerning matters related to reindeer herding and climate change.

## VI. Concluding observations

45. Reindeer herding communities around the world have throughout history managed to adapt to dramatic changes, such as the process of colonization, the introduction of Christianity, the inclusion of traditional pastoral territories in different nation States, industrialization, Communism, the market economy and modernization.[5] Globalization has also introduced a new reality for many reindeer herding communities. The cumulative effects of land fragmentation, natural resource exploitation, dwindling access to land (and rights), together with the multiple effects of climate change on ecosystems in the Arctic, have put hard pressure on the reindeer herding communities in the world. The mainstream approach to solve "the problem" is to look for ways to stop these symptoms from becoming even worse. If solutions are to be found, it is important to start looking at causes for climate change such as: energy consumption, globalization, landscape fragmentation, exploitation of natural resources, unlimited economic growth, questions of consumption and life style.

46. The situation of reindeer herding communities is complex and due to limitations of the framework of the present study, further studies should be undertaken, and strategies and programmes should be developed and implemented, based on the principles in the United Nations Declaration on the Rights of Indigenous Peoples. A recent development in the Russian Federation gives an example of the complexity. According to a new federal land code entering into force as of 1 January 2010, reindeer herders and their communities have to buy or rent their traditional grazing lands. The Kautokeino Declaration[23] adopted by the 4th World Reindeer Herders' Congress held in Kautokeino, Norway, in 2009 expresses explicitly the need for a federal law in the Russian Federation on reindeer husbandry, addressing reindeer herding rights, the protection of pastures and the ownership of reindeer. The reindeer husbandry legislation in the Scandinavian countries is an example of such legislation.

47. In the scientific community, the impact of climate change adaptation and mitigation measures on reindeer herding has been a major discourse since the end of the 1990s. The matter was brought up on the agenda in regional and international forums and organizations at the beginning of the new millennium. On the national level, very few Governments have addressed the matter. Questions addressing

[34] See the Saami Parliament's "Living environment programme (*Eallinbiras*). Available from http://www.oloft.com/eallinbiras.pdf.

reindeer pastoralist vulnerability, adaptation to climate change, mitigation strategies and understanding of the concept of resilience need to be both more explored and made more operative by the scientific community, United Nations agencies, regional organizations and concerned Governments. This must be done in partnership with concerned indigenous reindeer herders and with the necessary resources allocated in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.

**Vulnerability**[35]

48. In terms of a framework to assess the degree to which reindeer pastoralists are likely to experience harm as a result of exposure to multiple and interacting forces of change, future studies should include questions like:

- How can the vulnerability of Arctic human ecological systems to societal natural perturbations be effectively characterised?
- Which perturbations (at local, regional and/or global scales) pose the greatest risks?
- How do reindeer pastoralists respond to perturbations in the societal and the natural environments?
- What determines adaptive capacity and how can it be quantified?
- What impacts result when ability to adapt to perturbations is constrained?
- What mitigation and adaptive strategies at local, regional and global scales reduce unfavourable impacts and how might promising strategies be facilitated?
- How do different reindeer herding communities assess risks associated with different vulnerabilities?
- How can herders' traditional knowledge be used to identify, develop and implement local strategies?

**Adaptation**[36]

49. The potential impact of climate variation and change on the productivity of herds can be ameliorated by tactical and strategic changes in herding practice. Herders' responses (feedback) represent coping at both individual and institutional levels. The model proposes that responses may be triggered at two levels. Ultimately, the herders respond to climate-induced changes in the performance of their animals. They also respond directly to the kinds of weather conditions that they recognize as important for successful herding. The model makes no assumptions about the extent or effectiveness of herders' ability to cope or about the magnitude of the influence of climate change on the system. This means we need to learn about our past, contemporary adaptive capacity, understand the institutional and legal barriers as well as the governance of adaptation.

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[35] Based on *State of the World's Indigenous Peoples* (United Nations Publication, Sales No. 09.VI.13).

[36] Based on United Nations Development Group, *Guidelines on Indigenous Peoples' Issues* (Geneva 2009). Available from http://www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf. Accessed on 20 January 2010.

**Resilience**[37]

50. Resilience refers often to the capacity to lead a continued existence by incorporating changes. Resilience (both social and ecological) is a crucial aspect of the sustainability of local livelihoods and resource utilization, and we need a better understanding of how societies build adaptive capacity in the face of climate change. In scientific discourse, it is argued that in coupled social-ecological systems, resilience is embedded in four key factors: learning to live with change and uncertainty; nurturing diversity for reorganization and renewal; combining different types of knowledge for learning; and opportunities for self-organization. Of these, the first three factors are directly relevant for investigating resilience embedded in the social organization of reindeer pastoralism. The fourth factor, opportunities for self-organization, refers to the need for central management systems to allow coupled social-ecological systems the freedom to self-organize. This is thus a factor that is not in the direct control of pastoralists, but depends on the actions of governmental authorities. Resilience studies of coupled social-ecological systems such as reindeer herding require recognition of the inseparability of the social and natural spheres. Resilience of coupled social-ecological systems operating in a natural setting, where change and not stability is the norm, requires, therefore, the ability to cope with and adapt to changes without degrading options for future adaptability. The opportunity to self-organize will, thus, be studied through investigating the impacts of institutional constraints and opportunities.

51. The extent of vulnerability and resilience to climate change depends not only on cultural aspects and ecosystem diversity but also on the political, legal and institutional rules that govern social-economic systems and social-ecological systems. Therefore, since adaptation to climate change is something that takes place on the local level, it is important that indigenous peoples and local societies themselves define the risks related to rapid change. Reindeer herding peoples have to prepare themselves, their society and management authorities for change and reduce their vulnerability to the effects of climatic change. Building competence locally and planning for warming in local Arctic societies must therefore be priorities for Arctic national States and indigenous peoples' institutions and organizations.

52. The adaptation to climate change demands training of local, regional and national Arctic leadership in long-term sustainable thinking, and developing mitigation strategies[38] based on the best available adaptation knowledge, as well as scientific and experience-based traditional and local knowledge. The national adaptation strategies must recognize indigenous pastoral peoples' traditional knowledge and cultural and linguistics rights based on a human rights approach.

53. There is a need to find ways to regulate human activity in the Arctic.[23] Natural resource development, transport and tourism represent some of the drivers in that development. Against this background, there is a need to develop and implement integrated management plans for reindeer pastures in the Arctic, on national levels,

[37] See Carl Folke, "Resilience: the emergence of a perspective for social-ecological systems analyses", *Global Environmental Change*, vol. 16 (August 2006).

[38] See *Making Protected Areas Relevant: A Guide to Integrating Protected Areas Into Wider Landscapes, Seascapes and Sectoral Plans and Strategies*, CBD Technical Series No. 44 (Montreal, Canada, Secretariat of the Convention on Biological Diversity, 2010).

to secure future sustainability of indigenous herding communities and cultures in the face of climate change and land use change in the Arctic region.

54. There is an urgent need to facilitate investigation and studies within the United Nations framework on changes in grazing land in the reindeer herding areas in the circumpolar North and to establish a holistic and integrated understanding of the ongoing rapid changes in reindeer herding communities, driven partly by climate change and globalization, in order to maintain the sustainability and resilience of indigenous reindeer herding societies and cultures in the future.

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Items 3, 4 and 7 of the provisional agenda*

**Discussion on the special theme for the year: "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples"**

**Human rights**

**Future work of the Permanent Forum, including issues of the Economic and Social Council and emerging issues**

# Ongoing priorities and themes

## Note by the secretariat

*Summary*

The present note provides an overview of developments under the mandated areas of the United Nations Permanent Forum on Indigenous Issues since its eighth session. The report highlights relevant activities and priorities that have been gleaned from various reports of the United Nations system and other intergovernmental organizations as well as activities and reports from members of the Permanent Forum and from the secretariat.

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# I. Introduction

1. At its eighth session in 2009, the United Nations Permanent Forum on Indigenous Issues focused on the implementation of its recommendations of previous sessions in the areas of (a) economic and social development, (b) indigenous women, and (c) the Second International Decade of the World's Indigenous People. The secretariat of the Permanent Forum submitted analytical reports on the above three areas to assist in the assessment of implementation of the recommendations of the Permanent Forum. As part of its new methods of work, the Forum also held in-depth dialogues with six United Nations agencies (Food and Agriculture Organization of the United Nations (FAO), International Fund for Agriculture Development (IFAD), Office of the United Nations High Commissioner for Human Rights (OHCHR), Department of Economic and Social Affairs of the Secretariat of the United Nations, United Nations Development Programme (UNDP) and United Nations Population Fund (UNFPA)) and issued recommendations. The Permanent Forum will continue to focus on implementation of its recommendations at its tenth session in 2010.

2. In October 2009, the Department of Economic and Social Affairs invited written contributions from the United Nations system and other intergovernmental organizations, Member States and non-governmental organizations (NGOs) on the theme of the Permanent Forum and also on the implementation of the recommendations of the Permanent Forum. As of 31 January 2010, written submissions had been received from 14 United Nations and other intergovernmental entities (African Development Bank, United Nations Children's Fund (UNICEF), United Nations Secretariat Department of Political Affairs, Department of Public Information, Division for the Advancement of Women of the Department of Economic and Social Affairs, Office of Legal Affairs, Economic Commission for Latin America (ECLAC), European Commission, FAO, International Labour Organization (ILO), IFAD, International Organization for Migration (IOM), Secretariat of the Convention on Biological Diversity, World Food Programme (WFP)), six Member States (Plurinational State of Bolivia, Burkina Faso, Cambodia, Denmark, Mexico, Paraguay), and one NGO in consultative status with the Economic and Social Council (International Work Group for Indigenous Affairs). The African Development Bank provided a submission to the Forum for the first time, a welcome development demonstrating the increasing engagement of international financial institutions with the Forum.

### Some obstacles identified by United Nations agencies and Member States

3. A number of reports from Member States, intergovernmental agencies, funds and programmes identified obstacles in the implementation of norms and policies on indigenous peoples' issues. These obstacles include: (a) lack of funding and core resources for the implementation of programmes; (b) lack of disaggregated data at the national and local levels in order to improve the planning process; (c) lack of an explicit mandate to work on indigenous issues; (d) difficulty of implementing some recommendations of the Permanent Forum that may require the activation of formal procedures. One agency suggested that, in order to overcome the latter obstacle, the communication between the Permanent Forum and agencies could be further strengthened through a variety of means, including through Forum members and agencies consulting before finalizing specific recommendations.

**Some trends**

4. From the reports submitted this year, a number of trends are emerging.

(a) An increasing number of United Nations and other intergovernmental organizations are developing guidelines and policies on indigenous issues. In 2008 and 2009 such policies were adopted by the European Bank for Reconstruction and Development and by IFAD, as well as the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries. Currently, there are continuing efforts in that direction in UNICEF, FAO and IOM.

(b) There are increasing efforts for technical capacity-building on indigenous issues for United Nations staff and government officials at Headquarters as well as at the country level, including by IOM, ILO, the Department of Economic and Social Affairs and at the bilateral level.

(c) There are more country-level efforts to implement programmes on indigenous peoples' issues.

**Studies to be submitted at the ninth session of the Permanent Forum on Indigenous Issues**

5. A record number of studies completed by members of the Forum appointed as Special Rapporteurs will be before the Forum in 2010, namely:

(a) The impacts of the global economic crisis on indigenous peoples; identification of measures and proposals for Governments and United Nations bodies, agencies, funds and programmes to address the impacts (Victoria Tauli-Corpuz);

(b) Indigenous peoples and corporations (Elisa Canqui, Carlos Mamani and Pavel Sulyandziga);

(c) Study to determine whether climate change policies and projects adhere to the standards in the Declaration on the Rights of Indigenous Peoples (Paimaneh Hastaie and Hassan Id Balkassm);

(d) Indigenous fishing rights in the seas (Michael Dodson and Carsten Smith);

(e) Mother Earth rights (Bartholome Clavero and Carlos Mamani);

(f) Preliminary study on the impact of the international legal construct known as the Doctrine of Discovery on Indigenous Peoples that has served as the foundation for the violation of their human rights (Tonya Gonnella Frichner);

(g) Study to determine the impact of climate change adaptation and mitigation measures on reindeer herding (Lars-Anders Baer);

(h) Indigenous Peoples and Boarding Schools: A Comparative Study (this study was conducted by Andrea Smith, an outside expert).

6. These studies are relevant for various items in the agenda of the Forum, including the special theme of the year. Recent developments presented below under a specific theme may be relevant under other themes, given the interconnectedness of the mandated and other themes considered by the Permanent Forum.

# II. Developments under the mandated areas and special themes of the Permanent Forum, including the Millennium Development Goals

## A. Economic and social development

7. Economic and social development has always been a major area of concern for indigenous peoples. While development paradigms are often conceived in strictly economic terms and have often resulted in the destruction of indigenous governance, economic, social, education, cultural and spiritual and knowledge systems and natural resources, there is increasing realization of the need to consider alternative forms and concepts of development. The challenge remains for indigenous peoples to develop their own paradigms based on the United Nations Declaration on the Rights of Indigenous Peoples. There needs to be a concept of development with culture and identity that reflects indigenous peoples' own visions, perspectives and strategies, that respects their individual and collective rights and is self-determining, sensitive and relevant to their situation and communities.

8. The special theme of the Permanent Forum's ninth session is Indigenous peoples: development with culture and identity; articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples. This theme was also the topic for the International Expert Group Meeting held at United Nations Headquarters from 12 to 14 January 2010. Indigenous experts from the seven Permanent Forum regions as well as Permanent Forum members Victoria Tauli-Corpuz, Carlos Mamani, Tonya Gonnella Frichner and Pavel Sulyandziga were invited to give presentations. The workshop was attended by observers from the United Nations system and other intergovernmental organizations, NGOs and Member States. The report of the workshop is one of the documents of the current session. A contribution to the special theme of the Permanent Forum 2010 session is made by the Inter-Agency Support Group on Indigenous Peoples' Issues.

9. In January 2010 Permanent Forum members also participated in a workshop hosted by UNDP to discuss the concept of human development as well as contribute to the Human Development Report of 2010, which will deal with "rethinking development". In addition, Permanent Forum members have been actively involved in various aspects of development issues related to corporations, including extractive industries.

10. At its seventh session, the Permanent Forum appointed three of its members, Elisa Canqui Mollo, Carlos Mamani Condori and Pavel Sulyandziga, as Special Rapporteurs to conduct a study on indigenous peoples and corporations. A note by the Special Rapporteurs on their work appears in document E/C.19/2010/9.

### 2009 desk reviews of Human Development Reports

11. The 2009 desk review of Human Development Reports examines the extent to which indigenous peoples' issues are included in Human Development Reports from eight countries (Cambodia, Ghana, Kenya, Russian Federation, Rwanda, United Republic of Tanzania, Thailand, Uganda), one region (Asia Pacific), and one subregion (Niger Delta), and whether these Human Development Reports include analyses of indigenous peoples' development status in the context of the Millennium Development Goals. The following are some general conclusions:

(a) Except for Cambodia, the Reports that were reviewed have very little information on the state of human development of indigenous peoples, despite the fact that many face serious challenges in terms of development and human rights;

(b) None provided disaggregated data in the context of the Millennium Development Goals;

(c) In the case of the African countries and Thailand, indigenous peoples were not explicitly mentioned in the Reports, except as part of the collective poor and marginalized groups;

(d) In the context of the Millennium Development Goals, extreme poverty and high incidences of infant and maternal mortality seem to be the most pressing problems in indigenous communities, which are due to a number of factors, such as inadequate access to land, health services, safe drinking water, and natural resources — the most common causes of poverty and mortality among indigenous peoples;

(e) Land rights issues and disputes over ownership of land are a major concern for many indigenous peoples in the countries and regions reviewed. References to indigenous peoples were made when the Reports address land issues, particularly in the Cambodia and Nigeria Reports;

(f) Marginalization, discrimination and exclusion of indigenous peoples, although vaguely addressed except in the 2007 Ghana Report, are the most persistent social issues in all the countries reviewed;

(g) None of the Human Development Reports that were reviewed clearly indicate whether indigenous peoples participated, or were solicited to participate, in the preparation of the Reports.

12. The Human Development Reports have presented sound policy recommendations and delineated action-oriented efforts to combat major hurdles in human development and to achieve the Millennium Development Goals. Several of these recommendations have the potential to significantly benefit indigenous peoples. However, targeted measures to specifically improve the quality of life of indigenous peoples, and the recognition and protection of their rights, have not been fully addressed in the Reports. The following are recommendations for future Human Development Reports:

(a) Human Development Reports should highlight and include the plight of indigenous peoples, who are among the most marginalized groups in society and often the victims of development, as exemplified in the 2007 Cambodia Report;

(b) In order to properly identify the development challenges that indigenous peoples face, as well as the role they can play in the achievement of the Millennium Development Goals, their inclusion and participation in the preparation of Human Development Reports is imperative;

(c) Future country reports should include a comprehensive section on the poorest performing provinces or subregions and present disaggregated data in order to identify the specific populations that are clear outliers in terms of progress in human development;

(d) As a matter of urgency, major efforts are required in all the countries reviewed to properly implement poverty eradication plans targeted to benefit the poorest populations, including indigenous peoples;

(e) Huge efforts are needed to bring down child and maternal mortality rates, particularly in the African countries where HIV/AIDS, malaria, tuberculosis, and other communicable diseases are rife and are a constant threat to indigenous peoples living in abject poverty, with little or no health care at their disposal;

(f) For the countries reviewed, strong development partnerships that include national Governments, NGOs, bilateral and multilateral agencies, and other key stakeholders are necessary to help achieve Millennium Development Goal targets and human development goals.

### 2010 desk reviews of Millennium Development Goals country reports, and Common Country Assessment/United Nations Development Assistance Framework

13. In 2010 the secretariat of the Permanent Forum conducted desk reviews of five Millennium Development Goals country reports (Bangladesh, the Plurinational State of Bolivia, Chile, El Salvador, Namibia), one CCA (Guatemala) and three UNDAFs (Botswana, Nicaragua, Venezuela). The nine documents examined this year offer important information regarding development status, plans and challenges in the respective countries. However, the disparate level of attention to indigenous peoples and indigenous issues remains a challenge.

(a) The reports from Guatemala and the Plurinational State of Bolivia provide good examples of the mainstreaming and incorporation of indigenous peoples and issues, including the use of disaggregated data and a focus on indigenous peoples in all areas of development planning. The report from Venezuela also makes direct reference to indigenous peoples in several contexts.

(b) Reference to indigenous peoples in Millennium Development Goals country reports (Bangladesh, Bolivia and Chile) most often do so in the context of extreme poverty, gender equality and empowerment of women, child mortality and maternal health (Millennium Development Goals 1, 3, 4 and 5). The rate of poverty among indigenous peoples is reportedly far higher than either national or non-indigenous rates. However, the report from Chile shows that the rate of extreme poverty for indigenous peoples has decreased from 11 per cent in 1990 to 4.7 per cent in 2001. With regard to Millennium Development Goal 3 (gender equality and empowerment of women), the gap between men and women remains in indigenous communities despite some success in closing the educational gap. Regarding Millennium Development Goals 4 and 5 (child mortality and maternal health), the results in indigenous communities tend to be worse than those in non-indigenous areas. For Millennium Development Goal 5, professional attendance at birth is lower in areas with larger indigenous populations.

(c) The CCA for Guatemala highlighted the following priority problems relevant to indigenous peoples: (i) high prevalence of chronic malnutrition among those under 5 years of age and the deterioration in food security; (ii) inequality and exclusion in access to social services, asymmetries in economic opportunities; (iii) lack of mechanisms and spaces for full political participation.

(d) Only the UNDAF document for Venezuela recognized the need to address indigenous issues and efforts to build the capacity in indigenous communities to engage effectively with government and policy actors.

(e) A common challenge facing countries in relation to the Millennium Development Goals and indigenous peoples appears to be the relevance of addressing the development needs of minority populations. In countries where indigenous peoples make up a small minority, it is perhaps possible to marginalize them further when implementing development policies. The cultural and linguistic barriers that indigenous peoples face increase this risk, as contextualized and directed policies are often needed to realize the aims of the Millennium Development Goals in relation to indigenous peoples. Given the inherent costs and difficulties of developing such programmes as mother-tongue instruction for small demographics, there is the risk that Governments will choose programmes aimed at larger groups in order to improve their national-level results.

(f) In indigenous-majority countries such as the Plurinational State of Bolivia, the need to squarely address indigenous issues is more obvious, for it would be nearly impossible to successfully reach the Millennium Development Goals without addressing the situation of indigenous peoples in such countries. For indigenous-minority countries such as Bangladesh, however, it is clear that further efforts are needed to mainstream indigenous issues and emphasize the importance of an equal share in the benefits of Millennium Development Goals-related development across all segments of the population, including indigenous peoples.

(g) For future reports, the direct participation of indigenous peoples and indigenous peoples' groups should be encouraged by Governments, beginning from the planning and preparation process.

(h) This review recommends that the free, prior and informed consent of indigenous peoples should be sought in all development initiatives that involve them. Indigenous peoples cannot be simply objects of study or targets of development projects, no matter how well intended, but must be active participants in policy planning, implementation and review. Even the use of disaggregated data may in some instances be insufficient to understand the true scope of problems or the actual impact of particular programmes.

(i) Finally, this review reiterates the previous recommendations of similar reviews that Governments should improve the collection and disaggregation of data regarding Indigenous peoples.[1]

**Development Account**

14. The Development Account project entitled "Engaging indigenous women: local government capacity-building through new technologies in Latin America" was completed in 2009. A number of activities and capacity-building exercises were organized by the participating indigenous organizations in the Plurinational State of Bolivia, Ecuador and Peru. These activities were primarily aimed at empowering indigenous women to participate in decision-making processes that affect them, focusing on their right to receive and produce information in their own languages and cultural context. Furthermore, three indigenous organizations, in cooperation

[1] For the full text of the desk reviews, see www.un.org/esa/socdev/unpfii.

with local government, produced a wide range of informational materials for indigenous women, including radio and television programmes, web pages and magazines. The three indigenous organizations hosted their final workshops in November and December 2009, reviewing the whole project and evaluating the sustainability of the work.

## B. Environment

15. Climate change continues to dominate the work of the Permanent Forum owing to threats and dangers to the survival of indigenous communities from the impacts of climate change. Indigenous peoples have also raised concerns about adaptation and mitigation policies that may affect their lands, territories and resources. Indigenous peoples continue to call for their inclusion in the formation and implementation of climate change policies at the national and international levels and for the compliance of such policies and laws with indigenous peoples' rights as set out in the United Nations Declaration on the Rights of Indigenous Peoples and other human rights instruments.

16. Throughout 2009 Permanent Forum members, along with many indigenous peoples, participated in a number of important climate change meetings, such as the Indigenous Peoples' Global Summit on Climate Change in Anchorage, Alaska, as well as the United Nations Framework Convention on Climate Change Climate Change Talks in Bonn and Bangkok in the lead up to the 15th Conference of the States Parties to the Framework Convention, which was held in Copenhagen in December 2009.

17. In March,2010, the Fifth World Urban Forum will take place in Rio de Janeiro, Brazil, with the theme The Right to the City — Bridging the Urban Divide. The World Urban Forum will include a round table on indigenous peoples, focusing on the particular vulnerability of indigenous peoples to discrimination in their access to housing, on their being hindered from fully participating in the social, political and economic spheres of the city. The round table is expected to discuss environmental challenges, notably the effects of climate change on indigenous peoples' traditional territories. Climate change is likely to have significant negative impacts on shelter and livelihoods of indigenous peoples, contributing to their increased migration to urban areas.

18. An important area that will be discussed during the ninth session of the Permanent Forum is a study submitted by two Permanent Forum members on indigenous peoples' fishing rights. The comprehensive study includes an analysis of the potential protection of indigenous fishing rights in the seas provided by the existing international framework (E/C.19/2010/2).

## C. Education

19. At its eighth session and during the half-day discussion on the Arctic region, the Permanent Forum recommended that the Arctic Council formally engage with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations Environment Programme (UNEP) to jointly follow up on the International Expert Meeting on Climate Change and Arctic Sustainable Development: scientific, social, cultural and educational challenges. The Forum also

recognized the particular challenges that indigenous peoples of the Arctic face regarding education.[2]

20. Also during the eighth session, UNESCO reported on a recently completed project on engaging indigenous communities in several African States on the ways in which their cultural heritage and traditional knowledge can be applied to education for a sustainable future. UNESCO also reported on the elaboration of a 2008 concept paper entitled *Inclusive Dimensions of the Right to Education*, which is a valuable contribution to the integration of the United Nations Declaration on the Rights of Indigenous Peoples among the body of legal instruments that are taken into account when promoting the right to education.

21. In 2009, the secretariat of the Permanent Forum submitted to the Forum at its request an expert study entitled Indigenous Peoples and Boarding Schools: A Comparative Study.[3] It provides a historical overview of boarding schools, including their ideologies and practices as well as their worldwide locations. It also focuses on current boarding school practices and their purposes for remaining active for indigenous children. At its eighth session, the Permanent Forum welcomed the study and requested that it be made available as a document of the ninth session.

22. Pursuant to Human Rights Council resolutions 6/36 and 9/7 the Expert Mechanism on the Rights of Indigenous Peoples completed the "Study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education". The Permanent Forum recognizes that the right to education is a key to achieving equitable outcomes for indigenous peoples. The secretariat of the Permanent Forum contributed to the Expert Mechanism on the Rights of Indigenous Peoples study and focused on a rights-based approach to indigenous peoples' right to education, and key recommendations by the Permanent Forum.

## D. Health

23. Lack of access to health service remains a critical issue for indigenous peoples in both developing and developed Member States. Indigenous peoples face disproportionate rates in relation to treatable diseases and illnesses, including tuberculosis. Permanent Forum members have participated in the Assembly of First Nations' Stop TB Initiative with Permanent Forum member Elisa Canqui attending further workshops of the Stop TB initiative in Rio de Janeiro in March 2009 and in Cancun in December 2009.

24. The World Health Organization (WHO) is a member of the Inter-Agency Support Group on Indigenous Peoples' Issues and will host the annual meeting of the Group in 2010 in Geneva. WHO also participated in the training of trainers on indigenous peoples' issues that was organized by the secretariat of the Forum and the International Training Centre of the ILO in Turin, Italy, in June 2009.

25. In August 2009, the Johns Hopkins University Center for American Indian Health held its Indigenous Summer Research Institute programme in New York City. The secretariat of the Permanent Forum collaborated with the University to organize

[2] See *Official Records of the Economic and Social Council, 2009, Supplement No. 23* (E/2009/43-E/C.19/2009/14).

[3] E/C.19/2009/CRP.1).

a one-day session on the issue of indigenous peoples and health, which was held on 21 August 2009 at United Nations Headquarters.

## E. Culture

26. Culture forms the very basis for indigenous peoples' survival and well-being. Despite multiple threats, indigenous peoples' cultures continue to be dynamic and evolving. Culture is an important part of development because it forms the basis of understanding of peoples and societies. It is a progressive repository of wisdom, experience, knowledge, exchange, solidarity and ways of living together. In this way, indigenous peoples' culture becomes a key to decode the present and shape the future. Cultural diversity has a place in society and is one of the sources of development, as stated in the 2001 UNESCO Declaration,[4] understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.

27. The legal underpinnings of development with culture and identity are traced in a number of UNESCO and other human rights international instruments. UNESCO has given particular attention to the linkages between culture, development and identity through UNESCO instruments, such as the 2001 UNESCO Universal Declaration, the 2003 Convention for Safeguarding the Intangible Cultural Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The main human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and others, as well as the United Nations Declaration on the Rights of Indigenous Peoples clearly make the link between culture, human rights and development.

28. The United Nations Declaration emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations. The Declaration states that indigenous peoples and individuals are free and equal to all other peoples and individuals, and that they have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin and identity. Two normative pillars of the Declaration underpin development with culture and identity: the set of rights defining indigenous peoples' effective participation, and the set of rights defining indigenous peoples' cultural rights.

29. Respect for the cultural rights of indigenous peoples is a sine qua non of development with culture and identity. At least 17 articles of the United Nations Declaration outline the cultural rights of indigenous peoples, which are also stipulated in other international human rights instruments and further developed through the interpretation of international law by international courts and the international human rights bodies.

30. At its forty-third session, in 2009, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 21 on the right to participate in cultural life. The General Comment specifically mentions indigenous peoples, indicating that States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life,

[4] UNESCO Universal Declaration on Cultural Diversity article 3.

which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples.[5] It also mentions that indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, and that States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.[6]

## F. Human rights

31. Since its adoption, the promotion and implementation of the United Nations Declaration have been fundamental to the work of the Permanent Forum. At its seventh session, in 2008 — the first session since the adoption of the Declaration — the Permanent Forum stated its commitment to making it a living document throughout its work. The Permanent Forum also affirmed the Declaration as its legal framework and its intention to ensure that the Declaration is integrated into its own recommendations on its substantive mandated areas, as well as in the Forum's work under the special theme for each session and in its ongoing themes and priorities.

32. The Permanent Forum is specifically mentioned in article 42 of the United Nations Declaration as having a responsibility to promote full implementation of the Declaration. In January 2009, the Forum held an expert group meeting to discuss the ways in which it should address its mandate under article 42.

33. At its eighth session, the Permanent Forum placed a major focus on discussing how it will discharge its mandate under article 42. The Forum recommendations included an invitation to Member States to provide the Forum with substantive information on the implementation of the Declaration and an assessment of the effectiveness of the Declaration at the national and local levels. The Forum also recommended that Member States provide adequate information on the implementation of the Declaration in their core reports to the human rights treaty bodies and that they consult with indigenous peoples in a manner that fully respects their obligations under the Declaration. It also requested that the Secretary-General provide adequate human and financial resources for the purpose of meeting the requirements of articles 41 and 42 of the Declaration as they apply to the Permanent Forum.

34. In addition to its recommendations to Member States and the United Nations, at its eighth session, the Permanent Forum also adopted General Comment No. 1 (2009) on article 42 of the Declaration on the Rights of Indigenous Peoples. The commentary, inter alia, explores the legal character of the United Nations Declaration as well as the obligations of the Permanent Forum under article 42.

35. On the basis of an invitation from the Governments of Paraguay and the Plurinational State of Bolivia, the Forum undertook a mission to the Chaco region of both countries in April and May 2009. The purpose of the mission, which was supported by staff participation from FAO, ILO, OHCHR, the Department of Economic and Social Affairs and UNDP, was to address the situation of forced

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[5] E/C.12/GC/21, see in particular paras. 36-37.

[6] See Declaration on the Rights of Indigenous Peoples, art. 1. See also ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169).

labour of indigenous peoples living in the Chaco region. The mission, which was the first of its kind for the Permanent Forum, also sought to encourage effective cooperation at the country level among all actors, including the Governments, United Nations agencies and indigenous organizations and peoples, to lead to the speedy elimination of forced labour practices. The Permanent Forum has invited the Governments of the Plurinational State of Bolivia and Paraguay to report at the ninth session regarding their implementation of recommendations contained in the reports of the mission.

36. The implementation of the United Nations Declaration is a shared area of interest for the Forum, the Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples and the Expert Mechanism of the Rights of Indigenous Peoples. A number of steps have been taken in the past year to ensure that these three mandates act in a coordinated manner to best promote the implementation of the Declaration. A member of the Permanent Forum, Carlos Mamani, attended the second session of the Expert Mechanism, held at Geneva from 10 to 14 August 2009. The Forum also submitted a contribution to the Expert Mechanism's study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education.[7] The Special Rapporteur and a representative of the Expert Mechanism also participated in the eighth session of the Permanent Forum. The secretariat of the Forum and OHCHR organized a meeting of the three mandates and their secretariats. The meeting focused on coordination and cooperation and it was agreed that such meetings will continue to take place annually.

**Disability**

37. In accordance with article 34 of the Convention on the Rights of Persons with Disabilities, the first session of the Committee on the Rights of Persons with Disabilities took place in February 2009. Twelve members, elected at the first session of the Conference of States Parties, were inducted into the Committee.

38. The work of the Inter-Agency Support Group on Disability is important to the work of both the secretariat of the Forum and the secretariat of the Convention on the Rights of Persons with Disabilities. The two secretariats have agreed to exchange information and contribute to each other's work in particular in terms of bringing the normative framework of the United Nations to United Nations country teams within the UNDG framework.

## G. Awareness-raising, information and production of material and events

39. The secretariat of the Permanent Forum on Indigenous Issues organized or co-organized 19 events, including multi-stakeholder events in 2009. In addition, during the eighth session of the Forum, the Forum secretariat coordinated more than 60 side events, organized by indigenous peoples' organizations, non-governmental organizations and United Nations agencies and funds.

40. At the commemoration of the International Day of the World's Indigenous People at United Nations Headquarters on 9 August 2009,[8] a panel discussion,

[7] A/HRC/EMRIP/2009/2.

[8] The event was held on Monday, 10 August, as the International Day itself was on a Sunday.

entitled "Indigenous Peoples and HIV/AIDS", as well as a cultural event was organized. Messages for the Day were issued by the Secretary-General, the Under-Secretary-General for Economic and Social Affairs and the Coordinator of the Second International Decade of the World's Indigenous People, and the Chairperson of the Permanent Forum, among others.

41. The secretariat of the Permanent Forum on Indigenous Issues continues to maintain a robust web presence in English and Spanish, while seeking to improve and expand on its content in other languages. A Forum web page was opened in 2009 in Chinese, which contains information about the Permanent Forum, its mandate and history in addition to information about the Forum's sessions. The secretariat of the Forum, in cooperation with the United Nations Secretariat Department of Public Information, has sought to increase the dissemination of the United Nations Declaration on the Rights of Indigenous Peoples by supporting the translation of the Declaration into different languages. The Forum secretariat maintains a web page with a growing number of translations of the Declaration.[9]

**Materials produced**

42. The Permanent Forum secretariat has released various information and specialist materials and publications which can also be found on its website. Some of the recent publications include:

(a) *Human Development Reports and Indigenous Peoples: A Desk Review*.[10] A 2009 review of recent Human Development Reports and the extent to which indigenous peoples' issues are addressed, included or promoted.

(b) The right to food and indigenous peoples, a joint brief prepared by FAO and the Forum secretariat in 2009; looks at the right to food as a collective right, also addressing issues such as the legal foundation to the right to food, cultural dimensions and food sovereignty.

(c) *State of the World's Indigenous Peoples* (ST/ESA/328)[11] was launched on Thursday, 14 January 2010. This publication is a cooperative effort of independent experts working with the secretariat of the Permanent Forum on Indigenous Issues and the secretariat of the Department of Economic and Social Affairs. Worldwide launches took place in Mexico City, Bogota, Rio de Janeiro, Moscow, Brussels and at United Nations Headquarters in New York. Subsequent launches also took place in Sydney, Johannesburg and Manila.

(d) Desk reviews of selected Millennium Development Goals Reports, and Common Country Assessments/United Nations Development Assistance Frameworks, 2010. A review of the extent to which indigenous peoples' issues are included and promoted.[12]

[9] As of the writing of this report, there are 32 language versions of the Declaration available on the Forum website: www.un.org//esa/socdev/unpfii/en/declaration.html.

[10] See UNDP Human Development Reports website http://hdr.undp.org.

[11] United Nations publication, Sales No. 09.VI.13.

[12] All the material and publications are posted on www.un.org/esa/socdev/unpfii.

## II. Promotion of integration and coordination of indigenous issues

43. The Forum secretariat and the Forum continue to work closely with the Inter-Agency Support Group on Indigenous Peoples' Issues. The Group includes 32 intergovernmental entities, including several United Nations agencies and international financial institutions. The Group plays a key role in disseminating the United Nations Declaration on the Rights of Indigenous Peoples throughout the United Nations system.

44. The 2009 meeting of the Support Group was jointly convened and hosted by UNEP and UN-Habitat, from 28 to 30 September 2009, in Nairobi. A main objective of the meeting was to provide an insight into the situation of indigenous peoples in Africa and how the United Nations system could assist in its improvement.

45. Fifteen agencies from the United Nations as well as four members of the Forum, Lars-Anders Baer, Margaret Lokawua, Hassan Id Balkassm and Liliane Mbela Muzangi attended. In addition, indigenous organizations were invited to make presentations, as were the Working Group on Indigenous Peoples of the African Commission on Human and Peoples' Rights and the Kenya National Commission on Human Rights. The presenters provided case studies on issues faced by indigenous peoples of Africa, including issues related to climate change, pastoralism and mobility challenges. The United Nations Resident Coordinator of Kenya also addressed the meeting.

46. During the meeting, participants provided feedback on the eighth session of the Forum and discussed preparations for the ninth session; discussed the establishment of a community of practice on indigenous peoples' issues; explored ways to ensure the participation of indigenous peoples in United Nations processes such as CCA/UNDAF and project formulation/implementation; and discussed their participation in UNPFII sessions through the newly established in-depth dialogues. The Inter-Agency Support Group on Indigenous Peoples' Issues will submit a reflection paper on development with culture and identity for the ninth session of the Forum.

47. In connection with the meeting of the Support Group, an official visit of members of the Forum was made to UNEP and UN-Habitat.

### United Nations Development Group

48. Inter-agency work has continued aiming at the implementation of the United Nations Declaration on the Rights of Indigenous Peoples and of the UNDG Guidelines on Indigenous Peoples' Issues at the field level. An Action Plan was adopted for the roll-out of the UNDG Guidelines in 2008 and a Management Committee, composed of ILO, OHCHR, the secretariat of the Permanent Forum on Indigenous Issues, the Division for Social Policy and Development, the Department of Economic and Social Affairs, UNDP, UNFPA and UNICEF has been promoting this work. A major pillar of the Action Plan is capacity-building of the United Nations country teams. In June 2009, the secretariat of the Forum organized the first Training of Trainers Course on Indigenous Peoples' Issues, at the ILO Training Centre in Turin, and 18 United Nations system staff and indigenous experts were trained. During 2009 the training programme, based on a training module developed by the secretariat of the Forum, was delivered to three United Nations country teams, namely in Ecuador, Nepal and the Philippines. Following a letter to all United Nations Resident Coordinators about the availability of the training programme, the secretariat of the

Forum received considerable interest from a number of country teams. The Management Committee will promote an inter-agency effort to raise funds during 2010 for the implementation of the Action Plan, which is to be completed in 2013.

49. At the request of the Government of Ecuador and in cooperation with the United Nations country team in Ecuador, the Forum secretariat organized, on 19 October 2009, a meeting on indigenous issues and intercultural cooperation for government officials from some 15 ministries.

## I. Indigenous children and youth

50. In 2009 UNFPA provided information in its reports to the Permanent Forum on its work with indigenous children and youth (E/C.19/2009/3). UNFPA has supported programmes in several countries, advocating for the inclusion of indigenous adolescents and youth in national youth policies, in line with the Permanent Forum's recommendations on indigenous children and youth. UNFPA is also active in promoting education and sexual reproductive health among indigenous youth and children. In its report to the Permanent Forum, UN-Habitat highlighted that three of the resolutions adopted at the twentieth and twenty-first sessions of the Governing Council of UN-Habitat (2005, 2007) make particular reference to challenges faced by indigenous communities in the urban areas. In resolution 20/1 "Youth and human settlements, the Governing Council expressed its special concern "that girls and young women and indigenous young peoples are particularly at risk of exclusion and discrimination, and that gender inequalities also negatively affect boys and young men". One of the goals of UN-Habitat is to adopt targeted policies, programmes, projects and budgets for the development of indigenous peoples, with particular emphasis on indigenous children and youth.

51. An international expert group meeting on indigenous children and youth in detention, custody, foster care and adoption will take place in Vancouver, Canada, on 4 and 5 March 2010, sponsored by the First Nations Summit and co-sponsored by the secretariat of the Permanent Forum on Indigenous Issues. This meeting will explore various issues under the theme, including the removal of indigenous children from families and communities as a result of past government policies to promote assimilation; policies on boarding and residential schools; the vastly disproportionate rates of indigenous children and youth currently incarcerated or under punitive detention; and the disproportionate numbers of indigenous children in foster care and adoption programmes.

52. There are ongoing joint efforts between the Forum secretariat and UNICEF on indigenous youth events that will take place in New York prior to the ninth session of the Permanent Forum.

## J. Indigenous women

53. During its eighth session, the Forum conducted a review on the implementation of its previous recommendations on indigenous women. In preparation for the review, the Forum secretariat undertook an in-depth analysis of all Permanent Forum recommendations regarding indigenous women, as well as the activities undertaken to implement the recommendations, as presented in written reports to the Permanent Forum by the United Nations system, other intergovernmental organizations, Member

States and indigenous peoples' organizations. The Forum secretariat found that implementation was completed for 6 per cent of the recommendations, was ongoing for 48 per cent of the recommendations, while action on 46 per cent of recommendations had either not been initiated or reported. The analysis also explored factors that facilitated implementation of Forum recommendations, as well as constraints or obstacles to their implementation. The Forum secretariat has been working with the International Indigenous Women's Forum to co-sponsor a side-event at the fifty-fourth session of the Commission on the Status of Women. The event will focus on the perspectives of indigenous women regarding the implementation of the Beijing Platform for Action. Panellists will also discuss new opportunities for the protection of the human rights of indigenous women resulting from the adoption by the General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples in 2007.

54. In May 2009, the Bureau of the Permanent Forum met to consider project proposals for funding under the Trust Fund for the Second International Decade of the World's Indigenous Peoples. A number of projects selected for funding focused specifically on the situation of indigenous women: a project in Uganda seeks to address the impact of female genital mutilation on Tepeth indigenous peoples; projects in Thailand and Kenya seek to improve environmental protection through the empowerment of women and the transfer of traditional knowledge from indigenous women to indigenous girl children; a Panamanian grantee seeks to improve the leadership of Kuna women; and projects in India focus on the situation of migrant women and on the health development of indigenous women.

55. Since 2005, the secretariat of the Forum has been working in cooperation with other United Nations bodies and indigenous women's organizations to implement the United Nations Development Account project, "Engaging indigenous women: local-government capacity-building through new technologies in Latin America" (the Plurinational State of Bolivia, Ecuador and Peru). Information on 2009 developments can be found under section A above on economic and social development.

56. Given the focus of the annual ministerial review at the 2010 session of the Economic and Social Council, the Vice-Chair of the Permanent Forum, Ms. Tonya Gonnella Frichner, made a special presentation at a meeting with the Bureau of the Council held on 29 January 2010.

## III. United Nations Trust Fund on Indigenous Issues

57. In accordance with General Assembly resolutions 57/191 and 59/174 the Trust Fund on Indigenous Issues supports activities of the United Nations Permanent Forum on Indigenous Issues and projects and programmes undertaken during the Second International Decade of the World's Indigenous People.

58. In 2009, the Trust Fund on Indigenous Issues received contributions from the Plurinational State of Bolivia, Canada, Estonia, Finland, Mexico and IFAD, for funding of activities relating to the Forum. The total amount of contributions received in 2009 relating to the activities of the Forum amounted to $238,162.

59. During 2009, the Fund supported the travel of 21 Forum members to meetings that were of relevance to its mandate. These missions provided the opportunity for

members to raise awareness and promote integration and coordination of activities relating to indigenous issues.

60. In the light of the recently adopted United Nations Development Guidelines on Indigenous Peoples' Issues for United Nations country teams and the adoption of the Declaration on the Rights of Indigenous Peoples, the Fund supported the preparation and facilitation of a training workshop on indigenous peoples' issues for the Nepal United Nations country team (Kathmandu, 5-6 February 2009), and subsequent updating of the training module on indigenous peoples' issues, which was utilized at the training of trainers workshop in Turin.

61. The Fund supported the provision of translation services during the eighth session of the Forum for in-session documents and the provision of technical services related to special events held in conjunction with the session. The Fund also supported cultural events in connection with the commemoration of International Mother Earth Day, celebrated on 22 April.

62. In 2009, the Trust Fund on Indigenous Issues received a multi-year grant from IFAD (2009/2010) to support the advisory and information mandate of the Forum. Within the framework of the Plan of Action for the rolling out and implementation of the UNDG Guidelines on Indigenous Peoples' Issues, the grant is to support the Forum project on capacity development at the country level for improved dissemination and implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

63. In this regard, during 2009, the Trust Fund on Indigenous Issues supported the travel and tuition of five indigenous participants to a training of trainers on indigenous peoples' issues course at the ILO International Training Centre, Turin, and a facilitation team to training workshops on indigenous peoples in the Philippines and Ecuador.

64. In connection with the above-mentioned multi-year grant, during 2010, the Trust Fund on Indigenous Issues will provide for capacity development for United Nations country teams and government agencies and indigenous peoples' organizations under the United Nations Development Group Plan of Action for the roll-out of the UNDG Guidelines on Indigenous Peoples' Issues. This work will continue in 2011.

65. In connection with the Second International Decade of the World's Indigenous People, in 2009, the Trust Fund on Indigenous Issues received contributions from Algeria, Chile, Denmark, Estonia, Germany and Japan for funding programmes and projects under the Second Decade. The total amount of funds received for the activities relating to the Second International Decade of the World's Indigenous People was $161,683. The Bureau of the United Nations Permanent Forum on Indigenous Issues, acting as the advisory group, held a meeting in May 2009 to review all the project proposals received. At that meeting, 19 projects were approved by the advisory group and endorsed by the Under-Secretary-General for Economic and Social Affairs, acting as the Coordinator of the Second International Decade.

# IV. Second International Decade of the World's Indigenous People

66. The year 2010 will mark the midterm of the Second International Decade of the World's Indigenous People. Hence, and in accordance with resolution 63/161, paragraph 2, the General Assembly requested the Secretary-General, in consultation with Member States, relevant United Nations agencies and mechanisms, and other stakeholders including indigenous peoples' organizations, to submit a midterm assessment report to the General Assembly at its sixty-fifth session.

67. On 1 July 2009, the secretariat of the Permanent Forum on Indigenous Issues, Division for Social Policy and Development, Department of Economic and Social Affairs, issued a call for submission of information regarding the implementation of the Second Decade to Member States, United Nations agencies and intergovernmental organizations and to indigenous peoples' organizations worldwide. The objectives of the midterm assessment are to identify the degree of implementation and progress made regarding the goal and objectives of the Second Decade, to identify future key priority areas for strengthened action and possible strategies to promote these priority areas and to identify examples of "good practice" in (a) the promotion of the Second Decade and (b) the specific implementation of the goal and objectives of the Second Decade.

68. By January 2010, the secretariat of the Forum received contributions from 13 Member States, 11 indigenous peoples' organizations and 17 United Nations agencies and other intergovernmental organizations.

69. During its eighth session, the Forum conducted UNPFII a review of the degree of implementation of its recommendations on the Second Decade. The findings illustrated that a common challenge that various actors face in the implementation of the Second Decade is related to human and financial resources. It also concluded that even though many Member States and intergovernmental organizations do not specifically refer to the goal and objectives of the Second Decade, their programmes and actions are in general aligned with them (see E/C.19/2009/9).

70. Responding to the findings, the United Nations Permanent Forum on Indigenous Issues called for active participation by Member States, United Nations agencies and indigenous peoples in the midterm evaluation of the Second Decade. It also recommended that Member States and United Nations agencies apply the rights affirmed in the United Nations Declaration, identified as one of the major achievements of the Second Decade and in particular the Decade's objective on free, prior and informed consent of indigenous peoples.[2]